Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ARCHER-DANIELS-MIDLAND COMPANY,

Petitioner,

v.

DELLWOOD FARMS, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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149 pp

QUESTIONS PRESENTED

1. In a civil case, under what circumstances, if any, is it permissible to draw an adverse inference against a party from the decision of a nonparty to invoke the Fifth Amendment privilege against self-incrimination?

2. May a witness properly assert the Fifth Amendment privilege only if the witness's answer would in fact tend to be incriminating, or is the witness's entitlement to claim the privilege determined by the question and the setting in which it is asked?

3. May a plaintiff seeking to establish a conspiracy to restrain trade in violation of Section 1 of the Sherman Act survive summary judgment by presenting ambiguous evidence of such an agreement, without regard to (a) whether the conduct at issue is as consistent with permissible competition as it is with illegal conspiracy, or (b) whether any of plaintiff's evidence tends to exclude the possibility that the alleged conspirators acted independently?

LIST OF PARTIES

Petitioner Archer-Daniels-Midland Company was a defendant in the District Court and appellee in the Court of Appeals. Respondents, who were plaintiffs in the District Court and appellants in the Court of Appeals, were A & W Bottling, Inc., Carteret Packaging, Inc., Dellwood Farms, Inc., E.B. Evans Food Company, Inc., Golden Eagle, Inc., Grist Mill Company, Mohawk Distilled Products, Inc., Pepsi-Cola Bottling Company of Olean, Publix Super Markets, Inc., Rite Foods, Inc., Seven Up Bottling Company of Jasper, Southeastern Specialty Foods Corp., Sun-Dew Sales Corp., Tom's Foods, Inc., Tuscan Dairy Farms, Inc., Vineland Syrup, Inc., Vita Food Products, Inc., Wells Dairy, Inc., a/k/a Wells Blue Bunny Dairy, Inc., and Zarda Enterprises. Also a plaintiff in the District Court was Gray & Company. Also defendants in the District Court and appellees in the Court of Appeals were A.E. Staley Manufacturing Company, American Maize Products Company, and Cargill Incorporated. CPC International, Inc. was named as a defendant but settled with the plaintiffs early in the litigation.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Archer-Daniels-Midland Company is a publicly-held corporation. It has no parent companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Archer-Daniels-Midland Company ("ADM") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 18, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 295 F.3d 651 and is reproduced at A. 1a.[1] The order of the District Court is reported at 156 F. Supp. 2d 1017 and is reproduced at A. 28a.

JURISDICTION

The order of the District Court was entered on August 23, 2001. The judgment of the Court of Appeals was entered on June 18, 2002, and a timely petition for rehearing was denied on August 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] "A." denotes the appendix to this Petition, "DX" an exhibit filed by defendants in support of their motions for summary judgment, and "PX" an exhibit filed by plaintiffs in opposition to those motions.

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

STATEMENT

A. Reports of Grand Jury Investigations Lead to Private Civil Actions.

In 1995 the Department of Justice began grand jury investigations concerning the conduct of ADM and other companies in the markets for lysine,[2] citric acid, and high fructose corn syrup ("HFCS"). *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997). After the press reported the commencement of a grand jury investigation concerning HFCS, several law firms specializing in plaintiffs' class actions filed antitrust actions against ADM and other manufacturers of HFCS. The actions were filed on behalf of companies that had purchased HFCS from one or more of the manufacturers. A. 28a. The Judicial Panel on Multidistrict Litigation later transferred all federal actions involving HFCS to the District Court for the Central District of Illinois for consolidated or coordinated pretrial proceedings before Judge Michael M. Mihm. *Id.* The actions before Judge Mihm include a class action, which itself is a consolidation of several separate class

[2] Lysine is an amino acid used to stimulate an animal's growth.

actions, and an individual action by Gray & Company. A. 28a-29a. As the Court of Appeals noted, "Billions of dollars in treble damages are sought . . . . " A. 2a.

B. The Criminal Proceedings.

In 1996 ADM pled guilty to antitrust charges involving lysine and citric acid. DX 31. Three other producers of citric acid (Hoffman LaRoche, Haarman & Reimer, and Jungbunzlauer) also pled guilty to antitrust violations. *See In re Citric Acid Litig.*, 996 F. Supp. 951, 953 (N.D. Cal. 1998), *aff'd*, 191 F.3d 1090 (9th Cir. 1999). Cargill Inc., the only company besides ADM that is a participant in both the citric acid market and the HFCS market, was not charged in the grand jury investigation of the citric acid market and was granted summary judgment in the civil litigation involving that market. *See In re Citric Acid Litig.*, 996 F. Supp. at 962.

In 1996 a federal indictment was returned charging Michael Andreas and Terrance Wilson with fixing the price and allocating the sales volume of lysine. At the time of the offense charged, Andreas was an officer of ADM, and Wilson was a vice president. In 1998 Andreas and Wilson were tried and convicted on the charge involving lysine. At trial the prosecution supplemented its evidence about lysine with evidence that Andreas and Wilson had also taken part in an unlawful conspiracy involving citric acid.[3] But to date neither the Federal Government nor any State

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[3] *See, e.g.*, *United States v. Andreas*, 39 F. Supp. 2d 1048, 1070-71 (N.D. Ill. 1998); *United States v. Andreas*, 23 F. Supp. 2d 835, 845-46 (N.D. Ill. 1998); *see also United States v. Andreas*, 216 F.3d 645, 665-66 (7th Cir.), *cert. denied*, 531 U.S. 1014 (2000).

has brought charges against Andreas or Wilson based on their involvement in the citric acid conspiracy, and they have never been convicted or sentenced for their part in that conspiracy. Nor has any State prosecuted either man for committing an antitrust violation in the lysine market.

Whereas criminal charges were brought as a result of the grand jury investigations concerning lysine and citric acid, the federal grand jury investigation of the HFCS market ended in 1999 without charges being brought against anyone. DX 56; *see* A. 23a.

C. The Depositions of Andreas and Wilson.

In February 2001 plaintiffs took the depositions of Andreas and Wilson (who were no longer employed by ADM) at the Federal Prison Camp in Duluth, Minnesota, where both men were serving the sentences of imprisonment they had received in the lysine case. PX 26, 138-39; A. 44a. On advice of counsel, after giving their names, Andreas and Wilson asserted the Fifth Amendment privilege against self-incrimination as to all questions. *Id.* The questioning by plaintiffs' counsel nonetheless continued for more than 200 pages at Andreas's deposition and for more than 300 pages at Wilson's deposition. *Id.* The questions posed concerned lysine and citric acid, as well as HFCS. *Id.*

Plaintiffs deposed numerous employees and former employees of other defendants who had attended meetings of the Corn Refiners Association (a trade association plaintiffs contended was used as a vehicle for an antitrust conspiracy in the HFCS market) or had spoken with Andreas or Wilson. Those witnesses answered all of plaintiffs' questions, without invoking the Fifth Amendment as to a single question. A. 44a.

D. The District Court's Decision.

After the close of discovery, defendants moved for summary judgment. Plaintiffs opposed the motion, relying in part upon adverse inferences they said should be drawn from the claims of privilege by former ADM employees Andreas and Wilson. PX 26, 138-39. Plaintiffs pointed to no evidence of any ongoing relationship between ADM and either Andreas or Wilson at the time of the depositions in 2001, nor to any evidence that ADM had any control over their decisions to invoke the Fifth Amendment.

The District Court granted the defendants' motions for summary judgment. A. 28a. It ruled that the adverse inferences plaintiffs sought to draw against the defendants from the Fifth Amendment invocations of Andreas and Wilson were untrustworthy, and that the invocations were therefore inadmissible:

> Under the circumstances and evidence present in this case, the Court concludes that no trustworthy inference of conspiratorial conduct can fairly be drawn from the depositions of Andreas, Wilson, and Cox without resorting to bald speculation or conjecture.

A. 46a.

After an exhaustive review of the evidence plaintiffs had put forward in opposition to the motions for summary judgment, A. 46a-102a, the District Court held that the "totality of Plaintiffs' evidentiary showings" did "not tend to exclude the possibility that Defendants were pursuing their legitimate independent interests," and did not give rise to a reasonable inference of conspiracy that was "more plausible than that of individual action." A. 102a-103a (internal quotation omitted). Accordingly, the court held

that the admissible evidence relied upon by plaintiffs did not create a genuine issue of material fact as to whether the defendants had conspired to fix the price of HFCS. A. 103a.

E. The Court of Appeals' Decision.

The Court of Appeals reversed. A. 1a-27a. It first held that the evidence that was admissible against all defendants was sufficient to create a triable issue of fact as to whether there had been a conspiracy to fix prices. A. 7a-21a. In reaching that conclusion, the Court of Appeals assessed whether an agreement could be inferred from the admittedly ambiguous evidence plaintiffs had presented, A. 3a, without reference to the standards for evaluating ambiguous evidence set forth in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

That ruling was sufficient to decide the appeal, but the court also reviewed the District Court's evidentiary ruling concerning the claims of privilege by Andreas and Wilson. The Court of Appeals reversed that ruling in part, holding that the claims of privilege were admissible evidence against ADM. A. 21a-23a.[4]

Although neither Andreas nor Wilson is a party to this case, the Court of Appeals relied upon *Baxter v. Palmigiano*, 425 U.S. 308 (1976), a decision involving

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[4] The Court of Appeals did not disturb the District Court's ruling as to the Fifth Amendment invocations of Barry Cox, who was also employed by ADM during the time period of the alleged HFCS conspiracy. Cox's invocations therefore are not at issue on this petition.

invocation of the Fifth Amendment by a party. The Court of Appeals held that *Baxter* establishes a "general rule" that "an adverse inference may be drawn from [invocation of the Fifth Amendment] in a civil case" – a rule limited only by a trial judge's "general power under Fed. R. Evid. 403 to exclude relevant evidence if its probative value is clearly outweighed by (so far as relevant here) its capacity to confuse the jury." A. 21a.

Next, the Court of Appeals faulted the District Court for not appreciating that Andreas and Wilson could have properly invoked the Fifth Amendment only if their *answers* would have tended to subject them to criminal liability. A. 22a. "To be privileged by the Fifth Amendment to refuse to answer a question," the Court of Appeals declared, "the answer one would give if one did answer it must have *some* tendency to subject the person being asked the question to criminal liability." *Id.*

The Court of Appeals did not leave it to the District Court on remand to apply the new rules that the Court of Appeals had announced; it instead applied the rules itself and found the Fifth Amendment invocations admissible. It reasoned that at the time of their depositions Andreas and Wilson already "had been convicted and sentenced for their role in the other price-fixing *conspiracies* and had exhausted their appellate remedies." *Id.* (emphasis added). The charges against Andreas and Wilson had in fact concerned only the lysine market – and neither man had been convicted or sentenced for his role in the citric acid conspiracy. The Court of Appeals nevertheless concluded that Andreas and Wilson faced no further exposure to criminal charges concerning either lysine or citric acid, and therefore must have invoked the Fifth Amendment

because of fear that their answers would implicate them in a conspiracy involving HFCS:

> They faced no further jeopardy – unless truthful answers to questions about the HFCS conspiracy would have tended to show that ADM had conspired to fix the price of that product as well. That would justify and explain their taking the Fifth and it would also entitle a jury to treat their refusal to answer as evidence that there indeed was such a conspiracy.

Id. ADM filed a petition for rehearing with suggestion for rehearing en banc, but the petition was denied. A. 105a-106a.[5]

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[5] In an order entered three days later on August 8, 2002 (A. 107a), the Court of Appeals struck the words "and citric acid" from the following sentence in its opinion: "The fact that Andreas and Wilson were in prison for having fixed the prices for lysine and citric acid would not have authorized them to invoke the Fifth Amendment if asked whether they had helped Richard III kill the little princes and bury them in the Tower of London." A. 22a. But although the court eliminated that express reference to imprisonment for fixing the price of citric acid, it adhered to the same reasoning it had stated earlier: Andreas and Wilson purportedly "had been convicted and sentenced for their role in the other price-fixing *conspiracies* and had exhausted their appellate remedies," and they therefore purportedly "faced no further jeopardy – unless truthful answers to questions about the HFCS conspiracy would have tended to show that ADM had conspired to fix the price of that product as well." *Id.* (emphasis added).

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Divided as to the Proper Treatment of Fifth Amendment Invocations by Nonparties in Civil Cases.

This case presents an issue that the lower courts as well as commentators have long struggled with but that this Court has never addressed: In a civil case, when a nonparty refuses to answer a question in reliance upon the Fifth Amendment privilege against self-incrimination, under what circumstances, if any, may an adverse inference be drawn from that refusal? The nonparty's invocation of the Fifth Amendment is not sworn testimony. It cannot be cross-examined. And as a practical matter it is seldom possible for anyone to successfully challenge the assertion of the privilege and force the nonparty to testify. In what circumstances is it nevertheless permissible to treat the nonparty's invocation of the Fifth Amendment as evidence against one of the parties?

The courts of appeals are divided. The First Circuit holds that "[a]n individual's invocation of his fifth amendment privilege against self-incrimination is a personal decision" that generally cannot be held against his corporate employer (let alone against a former employer). *Veranda Beach Club Ltd. P'ship v. W. Sur. Co.*, 936 F.2d 1364, 1374 (1st Cir. 1991). The Second, Third, Fifth, and Eighth Circuits hold that Fifth Amendment invocations by nonparties are to be admitted or excluded based on a case-by-case weighing of all the circumstances, with the Second Circuit focusing upon the trustworthiness of the proposed adverse inference. *See* pp. 14-15, *infra*. And the Seventh Circuit has now broadly held that such claims of privilege are admissible, subject only to a trial judge's authority under Rule 403 to exclude evidence because its probative

value is clearly outweighed by the risk of confusion. A. 21a.

This Court should resolve the conflict and limit the admission of Fifth Amendment invocations by nonparties. The treatment of such invocations as competent evidence was vigorously protested by Judges Ralph Winter and Herbert Stern two decades ago, and their arguments are just as powerful today. It is still true that treating Fifth Amendment invocations as evidence "allows juries to draw prejudicial inferences from leading questions put to witnesses, denies parties the right to cross-examine, and is an invitation to sharp practice." *Brink's Inc. v. City of N.Y.*, 717 F.2d 700, 715 (2d Cir. 1983) (Winter, J., dissenting). It is still true that "juries are left with nothing but rank speculation in attempting to draw inferences" from a witness's invocation of the Fifth Amendment. *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 245 (3d Cir. 1983) (Stern, D.J., dissenting).[6]

Indeed, the position of Judges Winter and Stern has recently been bolstered by this Court's unanimous decision in *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam). There, the Court made clear that, for a witness to be entitled to claim the protection of the Fifth Amendment, "'[i]t need only be evident from the implications of *the question*, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure

[6] Before his nomination to the bench in 1974, Judge Stern had served for twelve years as a prosecutor, including three years as United States Attorney for the District of New Jersey.

could result.'" *Id.* at 20-21 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951)) (emphasis added). Contrary to the Court of Appeals' assumption, A. 22a, it is simply not the case that witnesses may invoke the Fifth Amendment only if their answers would tend to incriminate them. The availability of the privilege depends upon the question and the setting, not on what the witness's answer would be. Judges Winter and Stern are thus quite right that to admit Fifth Amendment invocations by nonparties is to open the courtroom to sharp practice and guesswork. At the very least, such an invocation should be admitted only if the trial court finds that the party against whom the invocation is offered has control over the witness, or that other special circumstances justify its admission.

A. The Traditional Approach to Fifth Amendment Invocations by Nonparties.

Until the early 1980's, the great weight of appellate authority treated Fifth Amendment invocations by nonparties as lacking any probative value, or at least as having so little probative value as to be dwarfed by the risks inherent in putting such invocations before the jury. *See* 8 J. WIGMORE, EVIDENCE § 2272, at 437 (McNaughton rev. 1961) ("an inference against the party is not to be made because of the witness' claim of privilege").

In the reported cases, the question arose most often in criminal cases. Typically, a defendant, contending that a person not on trial committed the offense with which the defendant was charged, subpoenaed that person to testify. The witness then asserted the Fifth Amendment. (Sometimes this occurred in the jury's presence; sometimes it

became clear outside the jury's presence that the witness would assert the Fifth Amendment.) The defense argued that it should be allowed to urge the jury to draw an inference in the defendant's favor from the witness's invocation of the Fifth Amendment. The courts consistently held that no such inference was proper, and that defendants did not even have a right to have the Fifth Amendment assertion occur in the jury's presence, much less to urge the jury to draw an inference from it. *See, e.g.*, *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *United States v. Beye*, 445 F.2d 1037, 1038 (9th Cir. 1971); *Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970) (en banc); *United States v. Atnip*, 374 F.2d 720, 723 (7th Cir. 1967).[7]

Very few reported decisions before 1983 addressed Fifth Amendment invocations by nonparties in civil cases. Although numerous decisions recognized that an adverse inference could be drawn when *a party* to a civil case claimed the Fifth Amendment privilege, those decisions generally stressed the status of the privilege claimant as a litigant. *See, e.g.*, *Campbell v. Gerrans*, 592 F.2d 1054,

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[7] This rule is still followed today. *See, e.g.*, *United States v. Marbrook*, 301 F.3d 503, 507 (7th Cir. 2002) ("we have never found that it is permissible for a jury to make an inference from the invocation of a witness's assertion [*sic*] of the Fifth Amendment"). A similar rule has long been followed when the witness invoking the Fifth Amendment was called by the prosecution rather than the defense. *See, e.g.*, *United States v. Castillo*, 615 F.2d 878, 884 (9th Cir. 1980); *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959); *Billeci v. United States*, 184 F.2d 394, 398 (D.C. Cir. 1950); *Beach v. United States*, 46 F. 754 (C.C.N.D. Cal. 1890) (Field, J.).

1058 (9th Cir. 1979); *Cabril-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978).

In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), this Court referred with approval to the rule allowing an adverse inference in a civil case from a party's assertion of the Fifth Amendment. In *Baxter*, the Court considered whether the Fifth Amendment precluded the disciplinary board of a state prison from drawing an adverse inference when an inmate alleged to have incited a disturbance remained silent at his disciplinary hearing. After noting that "[p]rison disciplinary hearings are not criminal proceedings . . . ," *id.* at 316, the Court held that the Fifth Amendment did not bar such an inference. *Id.* at 317-18. The Court explained that its conclusion was "consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause*.'" *Id.* at 318 (quoting 8 J. WIGMORE, EVIDENCE § 2272, at 439 (McNaughton rev. 1961)).

Most of the pre-1983 appellate decisions that did address nonparty Fifth Amendment invocations in civil cases held that no inference could be drawn from them. For example, in *Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir. 1982), the Second Circuit held that "since King was a non-party witness, no adverse inference against appellees could have been drawn from his refusal to testify." *Id.* at 454 n.7; *see also Hinds v. John Hancock Mut. Life Ins. Co.*, 155 A.2d 721, 735-36 (Me. 1959).

B. The Departure from the Traditional Approach.

The year after it decided *Brenner*, the Second Circuit revisited the issue and, without citing *Brenner*, reached the opposite result. *See Brink's Inc. v. City of N.Y.*, 717 F.2d 700 (2d Cir. 1983). In an opinion by Judge Oakes, the Second Circuit held that invocations of the Fifth Amendment by former employees of the Brink's company were "admissible and competent evidence" that the City of New York could rely upon in support of its counterclaim against Brink's. *Id.* at 710. The Second Circuit cited *Baxter* for the proposition that "there is no constitutional mandate" excluding the Fifth Amendment invocations, *id.*, but for authority that the invocations constituted admissible evidence under federal law, the court relied primarily upon an article by Professor Robert Heidt in the *Yale Law Journal*.[8] Judge Winter dissented, protesting that *Baxter* was inapplicable because "the issue is not whether adverse inferences may be drawn against a *party* who asserts the fifth amendment in a civil action, but whether adverse inferences may be drawn against a party because a *witness* (whether or not another party) asserts the fifth amendment." *Id.* at 718. Judge Winter also objected that admitting nonparty invocations "inevitably invites jurors to give evidentiary weight to questions rather than answers" and "effectively denie[s]" the adversary "the right of cross-examination since the witness cannot ever be made to explain why the privilege has been invoked, much less

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[8] *See* 717 F.2d at 709-10 (discussing Robert Heidt, *The Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062 (1982)).

to contradict the intended inference." *Id.* at 716. In its most recent decision on the issue, the Second Circuit dismissed *Brenner* as involving "a fortuitous reference" and followed *Brink's,* but added that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances." *See LiButti v. United States*, 107 F.3d 110, 120-24 & n.4 (2d Cir. 1997).

Brink's has been followed in several other circuits as well. In *RAD Services, Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271 (3d Cir. 1986), the Third Circuit upheld the admission of Fifth Amendment invocations by former employees of a party. *Id.* at 274-79. Like the Second Circuit in *Brink's*, the Third Circuit relied upon Professor Heidt's article. *Id.* at 275-76. In *Cerro Gordo Charity v. Fireman's Fund American Life Insurance Co.*, 819 F.2d 1471 (8th Cir. 1987), the Eighth Circuit adopted a "case-by-case" approach to the admissibility of Fifth Amendment invocations by nonparties. *Id.* at 1481. The court upheld a ruling that had allowed one side to call a nonparty to the stand for the sole purpose of having the jury hear him assert the Fifth Amendment privilege. *Id.* at 1480-82. Similarly, in *FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969 (5th Cir. 1995), the Fifth Circuit ruled that trial judges should decide "on a case-by-case basis" whether a party may call to the stand a nonparty who has no special relationship with the party against whom an adverse inference is sought, for the purpose of having the nonparty invoke the Fifth Amendment in the jury's presence. *Id.* at 978. Once again, the court relied upon Professor Heidt's article. *Id.*

In contrast, the First Circuit has adhered to the traditional view of nonparty invocations. In *Veranda Beach*

Club Ltd. Partnership v. Western Surety Co., 936 F.2d 1364 (1st Cir. 1991), the First Circuit held that

> An individual's invocation of his fifth amendment privilege against self-incrimination is a personal decision. It cannot be imputed to a corporation.

Id. at 1374. The court ruled that Fifth Amendment invocations by an officer of a corporation that was a party to the case could not be held against the corporation. *See id.* at 1373-74.

In its decision in this case, the Court of Appeals not only departed from the traditional treatment of Fifth Amendment invocations by nonparties, but interpreted *Baxter* as establishing a "general rule" that "an adverse inference may be drawn from [invocation of the Fifth Amendment] in a civil case." A. 21a. In the Court of Appeals' view, that purported rule is confined only by a trial court's authority under Federal Rule of Evidence 403 to exclude relevant evidence whose probative value is clearly outweighed by its capacity to confuse the jury. *Id.* By treating the proper inquiry as solely a Rule 403 balancing, the Court of Appeals' decision creates even broader latitude for admission of nonparty Fifth Amendment invocations than the decisions of the Second, Third, Fifth, and Eighth Circuits.

C. The Need for Review by This Court.

This Court should grant certiorari in order to decide the proper treatment of nonparty invocations of the Fifth Amendment in civil cases. The Court of Appeals' decision

adopts a far looser approach to admission of such invocations than is warranted, and the circuits are in disarray with respect to this important and recurring issue.

There are critical differences between (i) drawing an inference against a party from his or her own invocation of the Fifth Amendment and (ii) drawing an inference against a party from a nonparty's invocation of the Fifth Amendment.[9]

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[9] Notwithstanding the reliance of a number of courts of appeals upon Professor Heidt's article (*see* pages 14-15, *supra*), many commentators have questioned the admission of nonparty Fifth Amendment invocations. One Note stated that "[t]he fairness of the judicial process is undermined if courts allow inferences to be drawn against a party when a non-party witness in no special relationship with a party at the time of trial invokes the fifth amendment." Dennis J. Bartlett, Note, *Adverse Inferences Based on Non-party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 NOTRE DAME L. REV. 370, 387 (1985). Similarly, attorney Michael Baylson (now a United States District Court Judge) wrote that "[a]n adverse inference is clearly improper against a defendant who has no 'control' over a witness who invokes the privilege or other relationship with the witness sufficient to warrant association of the witness with the party." Michael M. Baylson, *The Fifth Amendment in Civil Antitrust Litigation: Overview of Substantive Law*, 50 ANTITRUST L.J. 837, 844 (1981-82); *see also* Ray V. Hartwell, III and Douglas W. Kenyon, *Reconciling fifth amendment claims and the factfinding process in civil antitrust litigation*, 26 ANTITRUST BULL. 633, 664 (1981) ("[A]n inference ordinarily may not be made against a party where a nonparty witness claims the privilege, 'for this is not a matter under the party's control.'" (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 76, at 155 (2d ed. E. Cleary ed. 1972)); *but see* Aaron Van Oort, Comment, *Invocations as Evidence: Admitting Nonparty Witness Invocations of the Privilege Against Self-Incrimination*, 65 U. CHI. L. REV. 1435, 1437 (1998) ("courts should rarely exclude relevant nonparty witness invocations in civil or criminal cases").

In the former situation, the party, by his own conduct, has deliberately deprived his adversary in litigation of the opportunity to obtain testimony. It is not considered unfair to allow the adversary, who has been denied access to evidence, to urge the fact-finder to draw an adverse inference against the party responsible for the denial.[10] It is the decision to refuse to testify – not so much the invocation of the Fifth Amendment itself – that justifies permitting an adverse inference.

There is no similar justification for allowing a nonparty's invocation of the Fifth Amendment to be offered as evidence against a party. A party ordinarily has no control over whether a nonparty testifies or instead invokes the Fifth Amendment. The standard to be applied under these circumstances must take account of this absence of control, and of three additional factors that counsel against according evidentiary significance to the nonparty's assertion of privilege.

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[10] "[N]ot allowing the negative inference to be drawn 'poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth.'" *Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (quoting *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994)); *see Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996) ("one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding"). As Judge Winter noted in his dissent in *Brink's*, "[w]hether because of imperatives of the adversary system or intuitive judgments about fairness, acts or statements of parties, when offered by their adversaries, are not subjected to tests uniformly imposed upon non-party witnesses." 717 F.2d at 718; *see also id.* ("For example, the rule admitting extrajudicial statements by parties precludes not only objections that they are hearsay but also objections to form." (citation omitted)).

First, in the words of Judge Learned Hand, the incriminating answer hypothesized by the party advocating the adverse inference "has not the sanction of an oath." *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959). A claim of privilege is an assertion of a legal right; it is not testimony under oath. It does not satisfy the standards traditionally applied to determine whether something is evidence admissible in a court of law.

Second, the hypothetical answer cannot be cross-examined. *See id.* If the witness's Fifth Amendment invocation is deemed admissible evidence, the party against whom it is offered will thus be unable to test it through the process "traditionally relied upon expansively to test credibility as well as to seek the truth." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 259 (1983).

Third, a witness may be entirely innocent of any wrongdoing and yet be entitled to invoke the Fifth Amendment; a witness's assertion of the Fifth Amendment therefore does not indicate that the witness's answer would have been incriminating. The availability of the Fifth Amendment privilege depends, not upon whether the witness's answer would indicate his involvement in a crime, but upon the question and the setting. "'[I]t need only be evident from the implications of *the question*, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure could result.'" *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87

(1951)) (emphasis added).[11] Moreover, a responsive answer or an explanation of why a question cannot be answered "might be dangerous" not only if it would directly incriminate the witness, but also if it would furnish a link – which itself could be wholly innocuous – in a chain of evidence that could lead to prosecution. *See Maness v. Meyers*, 419 U.S. 449, 461 (1975) ("The protection [of the Fifth Amendment] does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.").[12]

Because of the rules that govern the entitlement to claim the Fifth Amendment privilege, it is ordinarily only by speculation that an adverse inference can be drawn

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[11] *See Malloy v. Hogan*, 378 U.S. 1, 11-12 (1964); *Curcio v. United States*, 354 U.S. 118, 121 n.2 (1957); *Emspak v. United States*, 349 U.S. 190, 198 (1955); *United States v. Reynolds*, 345 U.S. 1, 9 (1953). The privilege is unavailable only if "[i]t is impossible to say *from mere consideration of the questions propounded*, in the light of the circumstances disclosed, that they could have been answered with entire impunity." *Arndstein v. McCarthy*, 254 U.S. 71, 72 (1920) (Brandeis, J.) (emphasis added). *See also Brink's*, 717 F.2d at 716 (Winter, J., dissenting) ("[A]ssertion of the privilege in response to specific questions such as these quoted above is permissible whether the answer is 'yes' or 'absolutely not.' ").

[12] These rules reflect a recognition that "truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth." *Reiner*, 532 U.S. at 21. "[O]ne of the Fifth Amendment's basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances." *Id.* (emphasis and omissions in original) (internal quotations omitted).

from a witness's assertion of the privilege. Given the nature of the adversary system, such speculation is tolerable when a party's own invocation of the Fifth Amendment is involved. But it is generally intolerable when an adverse inference is sought against a party who was not responsible for the assertion of the privilege and is powerless to do anything about it. In criminal cases, the government has long been protected against such speculation, through decisions barring defendants from calling witnesses before the jury for the purpose of eliciting Fifth Amendment invocations. *See* p. 12, *supra*. Civil litigants would seem to deserve no less protection. Yet the Court of Appeals' decision invites routine admission of such assertions, subject only to the possibility of exclusion under Rule 403.

At a minimum, a Fifth Amendment invocation by a nonparty should be subjected to careful judicial screening before it is put before the jury. Even the Second Circuit, the first federal appellate court to endorse the admission of nonparty invocations, has recognized the need for such screening, by stressing the importance of whether the proposed adverse inference is trustworthy (although given the rules governing assertion of the privilege, it is hard to see how a court can assure itself that an adverse inference would be trustworthy). *See LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997). Similarly, the case-by-case approach that prevails in the Third, Fifth, and Eighth Circuits, though insufficiently sensitive to the dangers of admitting nonparty invocations, at least reflects an appreciation that such invocations require some special scrutiny. The Court of Appeals here has dispensed with such scrutiny, in favor of requiring the party against whom a nonparty invocation is offered to bear the burden

of demonstrating under Rule 403 that the probative value of the invocation (a probative value that is assumed under the Court of Appeals' standard) is clearly outweighed by the capacity for confusion. Whatever standard should ultimately be adopted to govern the admission of nonparty invocations, the Court of Appeals' decision clearly sets the evidentiary bar far too low.

II. The Court of Appeals' Holding That a Witness May Invoke the Fifth Amendment Only If His Answer Would Tend To Incriminate Him Conflicts with the Decisions of Other Court of Appeals and This Court.

Certiorari also should be granted to review the Court of Appeals' holding that, "[t]o be privileged by the Fifth Amendment to refuse to answer a question, *the answer* one would give if one did answer it" must have a tendency to incriminate the witness. A. 22a (emphasis added). That holding – which has broad implications both for determining when a witness is entitled to invoke the Fifth Amendment, and for assessing the evidentiary significance, if any, of a Fifth Amendment invocation – puts the Court of Appeals in conflict with decisions in many other circuits, which hold that the privilege is available if the question and the setting in which it is posed indicate that a responsive answer might be injurious to the witness. *See United States v. Bowling*, 239 F.3d 973, 977 (8th Cir. 2001); *United States v. Lumpkin*, 192 F.3d 280, 285 (2d Cir. 1999); *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983); *Capitol Prods. Corp. v. Hernon*, 457 F.2d 541, 544 (8th Cir. 1972); *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952). The Court of Appeals' holding also conflicts with this Court's decisions in *Reiner*, *Hoffman*, *Arndstein v.*

McCarthy, 254 U.S. 71, 72 (1920), *Malloy v. Hogan*, 378 U.S. 1, 11-12 (1964), *Curcio v. United States*, 354 U.S. 118, 121 n.2 (1957), *Emspak v. United States*, 349 U.S. 190, 198 (1955), and *United States v. Reynolds*, 345 U.S. 1, 9 (1953). *See* pp. 19-20 & note 11, *supra*. Every one of those cases recognizes that the question and the setting, rather than what the witness's answer would be (assuming the witness even knows), determine whether the protection of the Fifth Amendment applies.[13]

It is of vital importance to the administration of justice that the courts not be in doubt as to the standard governing a witness's entitlement to claim the constitutional privilege against self-incrimination. In this case, in an opinion by one of the most eminent appellate judges in the country, a circuit court whose docket includes a disproportionate share of significant cases has announced a standard governing the scope of the Fifth Amendment that threatens to create enormous mischief. This Court should grant certiorari and set aside the Court of Appeals' novel and ill-conceived restriction upon the reach of the Fifth Amendment.

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[13] *United States v. Apfelbaum*, 445 U.S. 115 (1980), upon which the Court of Appeals relied (A. 22a), in no way undermined the long line of decisions focusing upon the question and the surrounding circumstances. *Apfelbaum* merely reaffirmed the requirement that the risk of incrimination be "substantial and real," rather than "trifling or imaginary." 445 U.S. at 128 (internal quotations omitted). The Court did not cast the slightest doubt on the rule requiring that the assessment of the risk be based on the question and the setting, as opposed to what the witness's answer would be. Moreover, since *Apfelbaum* this Court has reaffirmed the question-based standard; it did so in its unanimous decision two Terms ago in *Reiner*. *See* 532 U.S. at 21-22.

III. The Court of Appeals' Standard for Summary Judgment in a Price-Fixing Case Is Inconsistent with This Court's Precedent and with the Standard Articulated by the Other Courts of Appeals

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court set forth the standards for determining whether an antitrust plaintiff has presented sufficient proof of an antitrust conspiracy. As this Court explained in *Matsushita*:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

475 U.S. at 588 (citations omitted).

> We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Id. at 597 n.21.

Following this Court's decision in *Matsushita*, courts of appeals in virtually every circuit have held that (1) conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy, and (2) a plaintiff seeking to establish a conspiracy by circumstantial proof must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. *In re Citric Acid Litig.*, 191 F.3d 1090, 1096 (9th Cir. 1999) ("The requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy – as Varni does – must produce evidence tending to exclude the possibility that defendants acted independently follows directly from the Supreme Court's opinion in *Matsushita* and is, as we have explained, well-established in both this circuit, as well as in our sister circuits." (citations omitted)); *Mitchael v. Intracorp., Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *In re Baby Foods Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) ("Thus, to withstand a motion for summary judgment a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged competitors acted independently." (internal quotation omitted)); *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 570 (11th Cir. 1998); *Corner Pocket of Sioux Falls v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1112 (8th Cir. 1997); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1170 (6th Cir. 1995); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990).

In the instant case, by contrast, the Seventh Circuit did not embrace any recognized formulation of the

Matsushita standard, or any other apparent limitation on the inferences that may be drawn from a plaintiff's admittedly ambiguous evidence. Instead, it merely held that

> Because price fixing is a per se violation of the Sherman Act, an admission by the defendants that they agreed to fix prices is all the proof a plaintiff needs. In the absence of such an admission, the plaintiff must present evidence from which the existence of such an agreement can be inferred – and remember that the plaintiffs in this case conceded that it must be an explicit, manifested agreement rather than a purely tacit meeting of the minds.

A. 3a. Indeed, the only reference to *Matsushita* appears in the court's discussion of the plaintiffs' need to demonstrate an explicit agreement to fix prices, as opposed to a tacit understanding:

> The question then becomes whether there is enough evidence for a reasonable jury to find that there was an explicit agreement, not merely a tacit one. To repeat, there is evidence that the defendants were not competing; we might go so far as to say they had tacitly agreed not to compete, or at least to compete as little as possible; but the plaintiffs must prove that there was an actual, manifest agreement not to compete. Another and equivalent way to put this is that they must present evidence that would enable a reasonable juror to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

A. 16a.

This is not a situation in which a court has used a different verbal formulation to articulate the same substantive inquiry. The Seventh Circuit's approach was intended to be and was fundamentally different from that of the other courts of appeals.[14] First, the court acknowledged that the evidence it discussed in the first section of the opinion was ambiguous in the sense that it was "consistent with the hypothesis that [the defendants] had a merely tacit agreement, which at least for purposes of this appeal the plaintiffs concede is not actionable under section 1 of the Sherman Act." A. 16a. With respect to the few additional bits of evidence it cited, the Seventh Circuit likewise recognized its ambiguous nature – "there are alternative interpretations of every bit of it," A. 21a – yet never analyzed (a) whether that evidence reasonably tended to exclude the possibility of independent action by the defendants, or (b) whether the conduct at issue was as consistent with permissible competition as with illegal conspiracy.

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[14] A discussion of this topic in a recent book by the author of the Seventh Circuit opinion makes unmistakable that the opinion is articulating a different standard:

> The development of the law in this area has been handicapped by an unfortunate dictum in *Monsanto Co.* v. *Spray-Rite Service Corp.* that to survive a motion for summary judgment the plaintiff in a price-fixing case must present evidence that "tends to exclude the possibility of independent action" by the defendants.

RICHARD POSNER, ANTITRUST LAW, at 99-100 (2d ed. 2001) (footnote omitted). In short, what the other circuits consider the prevailing legal standard as mandated by decisions of this Court is, in the view of the author of the Seventh Circuit opinion, merely "an unfortunate dictum."

The court's reference, for example, to ADM's "significant ownership interests in two of the other defendants," A. 21a, interests which have never been found to be unlawful or anticompetitive, could not, under any application of *Matsushita*, be considered evidence that is more consistent with conspiracy than with permissible competition. Similarly, in discussing a Cargill document that had speculated about the possible behavior of new entrants, the court had to admit that the incriminating interpretation it gave to the document was "not the only possible interpretation of the document, but it is a plausible one." A. 19a. The application of the *Matsushita* standard, however, would have obliged the Seventh Circuit to ask not whether there was a "plausible" incriminating interpretation, but rather whether the document was as consistent with permissible competition as with illegal conspiracy, which it surely was, and whether it tended to exclude the hypothesis that Cargill acted independently, which it surely did not.

The importance of this issue cannot be overstated. The frequency with which conspiracy claims are built upon ambiguous proof is underscored by the number of appellate opinions addressing this issue. The cases are replete with examples of the ambiguous evidence, including parallel pricing, data exchanges through trade associations, advance publication of changes in list prices, and sporadic efforts to verify customer claims about discounts available in the market, that plaintiffs routinely argue should provide a basis to infer a price-fixing conspiracy. It is clear that lawful, competitive conduct in many industries will be subject to challenge as an antitrust conspiracy if the proof requirements of *Matsushita* and *Monsanto* are relaxed in the manner permitted by the Seventh Circuit.

Given the "[b]illions of dollars in treble damages" (A. 2a) sought in this and other cases, litigation will not only be encouraged, but may in many cases become a risk that many companies cannot bear.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 01-3565

IN RE HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION.

APPEAL OF A & W BOTTLING, INC., *ET AL.*

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 C 1477, MDL 1087 – **Michael M. Mihm**, *Judge*.

ARGUED MAY 17, 2002 – DECIDED JUNE 18, 2002

Before BAUER, POSNER, AND KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiffs appeal from the grant of summary judgment to the defendants in an antitrust class action charging price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. 156 F. Supp. 2d 1017 (C.D. Ill. 2001). The defendants are the principal manufacturers of high fructose corn syrup (HFCS) – Archer Daniels Midland (ADM), A.E. Staley, Cargill, American Maize-Products, and CPC International (which has settled with the plaintiffs, however, and thus is no longer a party). The plaintiffs represent a certified class consisting of direct purchasers from the defendants.

HFCS is a sweetener manufactured from corn and used in soft drinks and other food products. There are two

grades, HFCS 42 and HFCS 55, the numbers referring to the percentage of fructose. HFCS 55, which constitutes about 60 percent of total sales of HFCS, is bought mostly by producers of soft drinks, with Coca-Cola and Pepsi-Cola between them accounting for about half the purchases. But many purchasers, of both grades of HFCS, are small. Industry sales exceeded $1 billion a year during the relevant period.

The plaintiffs claim that in 1988 the defendants secretly agreed to raise the prices of HFCS, that the conspiracy was implemented the following year, and that it continued until mid-1995 when the FBI raided ADM in search of evidence of another price-fixing conspiracy. Billions of dollars in treble damages are sought; we do not know whether the plaintiffs are also seeking injunctive relief, whether against renewal of the conspiracy, specific practices left in its wake (such as the 90 percent rule, of which more shortly), or both. The suit was brought in 1995 and though an enormous amount of evidence was amassed in pretrial discovery, the district judge concluded that "no reasonable jury could find in [the plaintiffs'] favor on the record presented in this case without resorting to pure speculation or conjecture." The soundness of this conclusion is the basic issue presented by the appeal.

Section 1 of the Sherman Act forbids contracts, combinations, or conspiracies in restraint of trade. This statutory language is broad enough, as we noted in *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 780 (7th Cir. 1999), to encompass a purely tacit agreement to fix prices, that is, an agreement made without any actual communication among the parties to the agreement. If a firm raises price in the expectation that its competitors will do likewise, and they do, the firm's behavior can be

conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices. Or as the creation of a contract implied in fact. "Suppose a person walks into a store and takes a newspaper that is for sale there, intending to pay for it. The circumstances would create a contract implied in fact" even though there was no communication between the parties. *A.E.I. Music Network, Inc. v. Business Computers, Inc.*, No. 01-1650, 2002 WL 1033947, at *3 (7th Cir. May 22, 2002). Nevertheless it is generally believed, and the plaintiffs implicitly accept, that an express, manifested agreement, and thus an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act. See, e.g., *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50-51 (7th Cir. 1992); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988); *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984); John E. Lopatka, "Solving the Oligopoly Problem: Turner's Try," 41 *Antitrust Bull.* 843, 896-903 (1996).

Because price fixing is a per se violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs. In the absence of such an admission, the plaintiff must present evidence from which the existence of such an agreement can be inferred – and remember that the plaintiffs in this case concede that it must be an explicit, manifested agreement rather than a purely tacit meeting of the minds. The evidence upon which a plaintiff will rely will usually be and in this case is of two types – economic evidence suggesting that the defendants were not in fact

competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types, and is in this case: evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a noncompetitive manner. Neither form of economic evidence is strictly necessary, see *United States v. Andreas*, 216 F.3d 645, 666 (7th Cir. 2000), since price-fixing agreements are illegal even if the parties were completely unrealistic in supposing they could influence the market price. But economic evidence is important in a case such as this in which, although there is noneconomic evidence, that evidence is suggestive rather than conclusive.

In deciding whether there is enough evidence of price fixing to create a jury issue, a court asked to dismiss a price-fixing suit on summary judgment must be careful to avoid three traps that the defendants in this case have cleverly laid in their brief. The first is to weigh conflicting evidence (the job of the jury), and is illustrated by a dispute between the parties over testimony by an executive of A.E. Staley that Coca-Cola, a major customer, suggested that the prices of HFCS 42 and HFCS 55 be fixed in a ratio of 9 to 10. The fact that the defendants all adopted this ratio is part of the plaintiffs' evidence of conspiracy, and the inference of conspiracy would be weakened if the initiative for the adoption had come from a customer. The defendants treat the Staley testimony as uncontradicted because Coca-Cola's witness did not deny having suggested the 9:10 ratio but instead testified that

he didn't recall having suggested it and was not aware of his company's ever having such a preference. The absence of a flat denial by Coca-Cola's witness of the Staley testimony would not as the defendants contend require a reasonable jury to accept that testimony, which is self-serving, uncorroborated, implausible (because the defendants achieved the ratio by raising the price of HFCS 42 rather than by lowering the price of HFCS 55, so Coca-Cola could not have benefited unless it just bought 55 and a competitor 42, which is not suggested), and inconsistent with the overall evidence of conspiracy, which as we shall see was abundant although not conclusive. A plaintiff cannot make his case just by asking the jury to disbelieve the defendant's witnesses, but there is much more here. The defendants' handling of the 90 percent issue illustrates how the statement of facts in the defendants' brief combines a recital of the facts favorable to the defendants with an interpretation favorable to them of the remaining evidence; and that is the character of a trial brief rather than of a brief defending a grant of summary judgment.

The second trap to be avoided in evaluating evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial? The question for the jury in a case such as this would simply be whether, when the evidence was

considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices. E.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 787 (7th Cir. 1999).

The third trap is failing to distinguish between the existence of a conspiracy and its efficacy. The defendants point out that many of the actual sales of HFCS during the period of the alleged conspiracy were made at prices below the defendants' list prices, and they intimate, without quite saying outright, that therefore even a bald-faced agreement to fix list prices would not be illegal in this industry. (Their brief states, for example, that "list prices are irrelevant here because the vast majority of HFCS sales were *not* made at list price" (emphasis in original).) That is wrong. An agreement to fix list prices is, as the defendants' able counsel reluctantly conceded at the argument of the appeal, a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices. Anyway sellers would not bother to fix list prices if they thought there would be no effect on transaction prices. Many sellers are blessed with customers who are "sleepers," that is, customers who don't shop around for the best buy; and even for those who do bargain for a lower price, the list price is usually the starting point for the bargaining and the higher it is (within reason) the higher the ultimately bargained price is likely to be. The defendants acknowledge that their "price lists served a useful purpose." The only useful purpose they might serve is as a guide to likely transaction prices. What is true is that if many sales are made at prices below the list price, the fact that the sellers' list prices are the same is not compelling proof of collusion. See *Reserve Supply Corp. v.*

Owens-Corning Fiberglas Corp., supra, 971 F.2d at 53-54. But it wouldn't be anyway, since identical list prices might be adopted by imitation rather than by explicit agreement.

Let us turn to the evidence that the HFCS market is one in which secret price fixing might actually have an effect on price and thus be worth attempting. The fact that price fixing has to be kept secret in order to avoid immediate detection followed promptly by punishment tends to rule out price fixing in markets that have many sellers selling a product heterogeneous with regard to quality and specifications and having good substitutes in production or consumption; that are concentrated on the buying side, enabling the buyers to tempt sellers to shade any agreed-upon price in order to obtain a big bloc of business; and that have other characteristics, unnecessary to detail here, that make it irrational to run the legal and business risks of fixing prices.

The plaintiffs' economic expert opined in his report and the defendants pretty much concede that the structure of the HFCS market, far from being inimical to secret price fixing, is favorable to it. We need not go into great detail on the point as it is not seriously contested. There are few sellers of HFCS. The five original defendants (recall that one has now settled with the plaintiffs) accounted during the period of the alleged conspiracy for 90 percent of the sales of the product. Therefore elaborate communications, quick to be detected, would not have been necessary to enable pricing to be coordinated. And if one seller broke ranks, the others would quickly discover the fact, and so the seller would have gained little from cheating on his coconspirators; the threat of such discovery tends to shore up a cartel. In addition, the product, HFCS, is highly standardized. Remember that there are

only two grades, 42 and 55; and both are uniform. So colluding sellers would not have to agree not only on price but also on quality, design, post-sale services, and the like. This is another reason why a successful conspiracy would not require such frequent communications as to make prompt detection likely. There also are no close substitutes for HFCS. Not that there aren't plenty of other sweeteners, such as sugar; but apparently they are not perceived as close substitutes by soft-drink manufacturers and other purchasers of HFCS. An attempt to raise price above cost would not be likely to come to grief by causing a hemorrhage of business to sellers in other markets.

And the defendants had a lot of excess capacity, a condition that makes price competition more than usually risky and collusion more than usually attractive. When a market's productive capacity exceeds the demand for the market's product, a very low price will cover the incremental cost of additional output because capacity will not have to be expanded in order to enable additional production. Competition will tend to drive price down to that level because any price above it will make some contribution to the seller's fixed costs (the costs that do not vary with output, such as the cost of building the seller's plant). But it will not be remunerative pricing, because it will not cover those costs in full. A seller might have a huge debt (a fixed cost, because owed regardless of how much the seller produces) because of its huge underutilized plant and yet find it impossible to service the debt because competition from other firms also cursed with excess capacity and so also desperate to find buyers who will pay a price that makes *some* contribution to their heavy fixed costs had driven its price down to, or very near, the incremental cost of its output. Suppose for example that the average total

cost of some quantity X of HFCS is $10, but the incremental cost required to sell X more of HFCS is only $5. Then at any price above $5, even if it is below $10, a sale will make some contribution to covering the seller's fixed costs. If several sellers with similar cost structures are competing, the tendency will be to drive the market price all the way down to $5, which will prevent the sellers from covering their total costs and thus confront them with the risk of bankruptcy. Conversely, precisely because of the discrepancy between total and variable cost, an agreement among the sellers that eliminates price competition will generate revenues enormously in excess of variable cost and so go far to stave off the threat of bankruptcy. And so the sellers will have a big incentive to fix prices.

As our numerical example suggests, the significance of excess capacity depends on the ratio of fixed to variable costs. If it is very low, the impact on the firms' solvency of competition that forces price down to variable costs may be slight. This is so far an unexplored issue in the litigation.

The defendants continued to add to their capacity during the period of the alleged conspiracy. This behavior does not disprove the existence of the conspiracy, as the defendants argue. Maintenance of excess capacity discourages new entry, which supracompetitive prices would otherwise attract, and also shores up a cartel by increasing the risk that its collapse will lead to a devastating price war ending in the bankruptcy of some or all of the former cartelists.

The principal features of the HFCS market that might seem to bear against an inference that secret price fixing was feasible and attractive during the period of the alleged conspiracy are, first, that HFCS is sold under two different

types of contract: straight sale, and what are called "tolling agreements." Under the latter, the customer buys the corn and hires one of the sellers of HFCS to manufacture it into HFCS. That sounds like something that would greatly complicate an HFCS price-fixing conspiracy, but there is evidence that it did not. It seems that the only practical difference between the two forms of sale is that the tolling agreement shifts the risk of a change in the raw-material cost (the cost of the corn) from seller to buyer. Prices under the two arrangements are highly correlated and the price of the HFCS net of the cost of the corn is easily determined, so that sellers could not easily cheat on a price-fixing agreement by reducing the price of their tolling contracts.

Second, there are some very large buyers of HFCS, notably Coca-Cola and Pepsi-Cola, and, as theory predicts, they drove hard bargains and obtained large discounts from the list price of HFCS 55. But it does not follow that the defendants could not and did not fix the price of HFCS 55. There is a difference between a market in which all or virtually all the buyers are large and one in which there are some large and some small buyers. Suppose the buying side of the HFCS market were as concentrated as the selling side, meaning that five firms bought 90 percent of all the HFCS sold. They would be able to whipsaw the sellers into granting large discounts, and probably therefore any effort at fixing prices would quickly collapse. When instead there are some large and some small buyers, which is the situation here, this need not prevent price fixing; it may simply cause the price fixers to engage in price discrimination, giving large discounts to the big buyers and no (or small) discounts to the small ones.

Market-wide price discrimination is a symptom of price fixing when, as in this case, the product sold by the market is uniform. *In re Brand Name Prescription Drug Antitrust Litigation*, 288 F.3d 1028, 1030-31 (7th Cir. 2002). If the product is differentiated and as a result each seller has a little pocket of monopoly power, enabling it to charge some of its customers a price above cost without their switching to its competitors, no inference of collusion can be drawn from the fact that the sellers are all discriminating. *Id.* In this case, however, the product is uniform (a "commodity"), so that competition would be expected to prevent any one seller from raising his price to any of his customers above his cost. If sellers are competing in the sale of an identical product which costs each of them $1 to produce (including in cost the market return on equity capital, "profit" in a financial though not in an economic sense), so that the competitive price, which is the market price because the sellers are competing, is $1, no one of them can sell his product to some of his customers for $2, for they can buy from his competitors for $1 – unless the sellers collude, and agree not to cut price to the disfavored buyers. This is a highly simplified example, obviously. It ignores and the parties do not discuss the possible erosion of price discrimination by arbitrage, that is, by the favored buyers' buying more than they need and reselling the excess to the disfavored, a process that may continue until all buyers obtain the seller's product at the same price. *Id.* But the example does illustrate an economic logic that favors the plaintiffs.

We turn now to the evidence of noncompetitive behavior, as distinct from evidence that the structure of the market was conducive to such behavior. Early in 1988, which is to say at the outset of the alleged conspiracy,

ADM announced that it was raising its price for HFCS 42 to 90 percent of the price of HFCS 55, and the other defendants quickly followed suit. The defendants offer various explanations, of which the most plausible is that HFCS 42 is 90 percent as sweet as HFCS 55. Even if this is correct (there is evidence that the true percentage is only 71 percent), it does not counter an inference of price fixing. In a competitive market, price is based on cost rather than on value. Therefore the fact that buyers of HFCS are willing to pay more for HFCS 55 than for HFCS 42 because it is sweeter just shows that a monopolist or cartel could charge more for the higher grade whereas competition would bid price down to cost. (That was our $1-$2 example; the fact that some customers would pay $2 did not make that a competitive price.) Under competition, if the cost of the lower grade were, say, half the cost of the higher, so would the price be. There is no evidence that HFCS 42 costs 90 percent as much to produce as HFCS 55. Nor is there any evidence that industry-wide adoption of the 90 percent rule followed or anticipated a change in relative costs. In fact, the evidence suggests that it costs only 65 percent as much to manufacture HFCS 42, implying that under competition its price would be 65 percent – not 90 percent – of the price of HFCS 55.

A few months after the adoption of the 90 percent rule, the defendants switched from making contracts with their customers that specified the contract price for an entire year to contracts in which price was negotiated quarterly. They did this although virtually all their customers preferred the former system in order to minimize risk. In other words, the defendants shifted risk to their customers (the sort of thing the tolling agreements did for customers who bought under those agreements) at the

same time that, according to evidence discussed below, the defendants were raising their prices net of cost, rather than lowering them to compensate the customers for assuming additional risk. That is not competitive behavior.

There is evidence that defendants bought HFCS from one another even when the defendant doing the buying could have produced the amount bought at a lower cost than the purchase price. There is nothing suspicious about a firm's occasionally buying from a competitor to supply a customer whom the firm for one reason or another can't at the moment supply. The firm would rather buy from a competitor to supply its customer than tell the customer to buy from the competitor, lest the customer never return. But if the firm *could* supply its customer (remember there was a lot of excess capacity in the HFCS industry during the period of the alleged conspiracy) *and* at a lower cost than its competitor would charge, why would it buy from the competitor rather than expanding its own production? The possibility that springs immediately to mind is that this is a way of shoring up a sellers' cartel by protecting the market share of each seller. A seller who experiences a surge in demand, but meets the surge by buying what it needs from another seller rather than by expanding its own production, protects the other firm's market share and so preserves peace among the cartelists. It is pertinent to note that these inter-competitor transactions ended with the end of the alleged conspiracy.

In part because of those transactions the market shares of the defendants changed very little during the period of the alleged conspiracy, which is just what one would expect of a group of sellers who are all charging the same prices for a uniform product and trying to keep everyone happy by maintaining the relative sales positions

of the group's members. This evidence probably does not deserve as much weight as the plaintiffs give it. They don't point us to any evidence of how market shares fluctuated before or after the period of the alleged conspiracy; and without such evidence there is no benchmark against which to assess the stability of the defendants' market shares during that period. But it is something, the evidence of stable market shares, for two reasons. First, had they gyrated wildly, this would be some evidence of active competition. The defendants argue that they did gyrate wildly, but their evidence involves comparing pre-conspiracy (1988) market shares with market shares during the period of the alleged conspiracy (the district court followed them in this mistake). If, consistent with that evidence, the gyrations moderated during the period of the alleged conspiracy, this would be evidence for the plaintiffs.

Second and much more important, the output of HFCS grew during this period and one might expect that growth to have brought about changes in market shares; for it would be unlikely that all the sellers had the same ability to exploit the new sales opportunities opened by the growing demand. This is why a growth in demand usually makes it more difficult for a cartel to hold together than if demand is steady. If demand is growing it is difficult for a seller to determine whether a decline in its market share is due to cheating by another member of the cartel or just to the superior ability of some other member or members of the cartel to attract new business without cutting price. The defendants emphasize *that* point but fail to acknowledge that the fact that market shares did not fluctuate significantly during the period of the alleged HFCS conspiracy may indicate that the sellers had agreed tacitly or

otherwise to share the sales opportunities created by the growth in demand. This is conjecture, but conjecture has its place in building a case out of circumstantial evidence.

The plaintiffs' economic expert witness conducted a regression analysis that found, after correcting for other factors likely to influence prices of HFCS, that those prices were higher during the period of the alleged conspiracy than they were before or after. (More precisely, the independent variable that the expert labeled CONSPIRE, which took a value of 1 during the period of the alleged conspiracy and a value of 0 before and after that period, was found to have a positive and statistically significant effect on the dependent variable, which was price.) The judge deemed the analysis admissible as evidence, thus certifying it as the responsible though of course not necessarily correct work of a qualified professional. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95 (1993). The defendants presented a competing regression analysis done by one of their economic experts, who added a couple of variables to the analysis of the plaintiffs' expert and, presto, the CONSPIRE variable ceased to be statistically significant. The plaintiffs rebutted with still another expert, who pointed out correctly that adding variables that are correlated with the variable of interest can make the effect of the latter disappear – to which the defendants reply, also correctly, that there are statistical methods for solving this problem (the problem of multicollinearity, as it is called by statisticians). They argue that their expert solved it and the plaintiffs argue that he did not and also that there was no statistical rationale for adding those other variables in the first place. Resolving this dispute requires a knowledge of statistical inference that judges do not possess. Later we'll suggest a method for resolving it.

But in the present state of the record we must accept that the plaintiffs have presented some admissible evidence that higher prices during the period of the alleged conspiracy cannot be fully explained by causes consistent with active competition, such as changes in the price of corn. For the same reason, we are disinclined to second guess, as the plaintiffs invite us to do, the district judge's refusal to exclude under the *Daubert* standard the reports of the defendants' experts.

To summarize the discussion to this point, there is evidence both that the HFCS market has a structure that is auspicious for price fixing and that during the period of the alleged conspiracy the defendants avoided or at least limited price competition. But as the defendants point out (when they are not arguing, inconsistently, that the industry was in fact fiercely competitive), all of this evidence is consistent with the hypothesis that they had a merely tacit agreement, which at least for purposes of this appeal the plaintiffs concede is not actionable under section 1 of the Sherman Act. The question then becomes whether there is enough evidence for a reasonable jury to find that there was an explicit agreement, not merely a tacit one. To repeat, there is evidence that the defendants were not competing; we might go so far as to say they had tacitly agreed not to compete, or at least to compete as little as possible; but the plaintiffs must prove that there was an actual, manifest agreement not to compete. Another and equivalent way to put this is that they must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so. See, e.g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

More evidence is required the less plausible the charge of collusive conduct. In *Matsushita*, for example, the charge was that the defendants had conspired to lower prices below cost in order to drive out competitors, and then to raise prices to monopoly levels. This was implausible for a variety of reasons, such as that it would mean that losses would be incurred in the near term in exchange for the speculative possibility of more than making them up in the uncertain and perhaps remote future – when, moreover, the competitors might come right back into the market as soon as (or shortly after) prices rose above cost, thus thwarting the conspirators' effort at recouping their losses with a commensurate profit. But the charge in this case involves no implausibility. The charge is of a garden-variety price-fixing conspiracy orchestrated by a firm, ADM, conceded to have fixed prices on related products (lysine and citric acid) during a period overlapping the period of the alleged conspiracy to fix the prices of HFCS. See *United States v. Andreas*, *supra*, 216 F.3d at 650-54; *In re Citric Acid Litigation*, 996 F. Supp. 951, 953-54 (N.D. Cal. 1998), aff'd, 191 F.3d 1090 (9th Cir. 1999).

We shall now summarize the evidence of explicit agreement, first noting however that the district judge refused to consider any of this evidence because he thought its character was such as to "require that a substantial inference be drawn in order to have evidentiary significance." This is correct in the sense that no single piece of the evidence that we're about to summarize is sufficient in itself to prove a price-fixing conspiracy. But that is not the question. The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment. The judge may have been confused by the

language found in cases such as *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 118 (3d Cir. 1999), that "direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." We tried in *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736-37 (7th Cir. 1994), to straighten out the confusing (and, as it seems to us, largely if not entirely superfluous) distinction between direct and circumstantial evidence. The former is evidence tantamount to an acknowledgment of guilt; the latter is everything else *including* ambiguous statements. These are not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial.

Here at any rate is the plaintiffs' evidence, which the district judge should not have disregarded, that there was an explicit agreement to fix prices: One of Staley's HFCS plant managers was heard to say: "We have an understanding within the industry not to undercut each other's prices." (He was commenting on a matter within the scope of his employment and his comment was therefore admissible as an admission by a party. Fed. R. Evid. 801(d)(2)(D).) A Staley document states that Staley will "support efforts to limit [HFCS] pricing to a quarterly basis." Presumably the reference is to efforts by its competitors. The president of ADM stated that "our competitors are our friends. Our customers are the enemy." This sentiment, which will win no friends for capitalism, was echoed by a director of Staley's parent company who said in a memo to Staley executives that "competitors[']' happiness is at least as important as customers[']' happiness." A director of Staley was reported to have said that "*every*

business I'm in is an organization" (emphasis added) – which sounds innocuous enough, but he said it in reference to the conspiracy to fix the price of lysine ("lysine is an organization") and so in context it appears that "organization" meant price-fixing conspiracy. Michael Andreas, the vice chairman and executive vice president of ADM, said: "What are you gonna tell [Keough, the recently retired president of Coca-Cola], that we gotta [i.e., have a] deal with . . . our two biggest competitors to fuck ya over[?]" Andreas, a principal figure in the lysine and citric acid price-fixing conspiracies, also referred to Cargill's president as a "friendly competitor" and mentioned an "understanding between the companies that . . . causes us not to . . . make irrational decisions." In a discussion with a Japanese businessman indicted along with Andreas for fixing the price of lysine, Andreas compared the relations between ADM and Cargill to those between Mitsubishi and Mitsui, two Japanese conglomerates widely believed to fix prices and allocate markets. Julie A. Shepard, Comment, "Using United States Antitrust Laws Against the Keiretsu as a Wedge Into the Japanese Market," 6 *Transnat'l Lawyer* 345, 349-50 (1993).

A handwritten Cargill document refers under the heading "competitors" to "entry of new entrants (barriers) and will they play by the rules (discipline)." A price-fixing conspiracy increases the attractiveness of entry into a market by creating a wedge between price and cost. And so conspirators will naturally worry whether, if there is entry, the new entrant will join rather than compete with the conspiracy and, if he refuses to join, whether the conspirators can punish him in some way. This is not the only possible interpretation of the document, but it is a plausible one.

Shortly after the FBI raided ADM's headquarters seeking evidence of the company's involvement in the lysine and citric-acid conspiracies, Terrence Wilson, the head of ADM's corn processing division – the division responsible for HFCS as well as for the other two products – said he didn't know "what other companies [the FBI] hit. . . . I don't know . . . if they hit Staley or not." Since Staley did not manufacture lysine or citric acid, but did of course manufacture HFCS, Wilson may have been expressing a concern that the FBI would uncover evidence of an HFCS price-fixing conspiracy as well. It is further worth noting that the alleged HFCS conspiracy began shortly after Wilson became head of ADM's corn products division – which raises the question why, if as the defendants argue the 90 percent rule and the other parallel behavior that is the plaintiffs' evidence of a lack of price competition in the HFCS market were just the natural expression of the oligopolistic structure of the market, this behavior should have begun when Wilson, later to be imprisoned for price fixing, took charge of ADM's HFCS operations. There may be an answer (pure coincidence, perhaps, or a change in the structure of the HFCS industry that suddenly made tacit collusion more attractive) – a point with general application to our review of the evidence that favors the plaintiffs – but its adequacy presents a genuine issue of material fact and therefore cannot be determined on summary judgment. And in a civil case price fixing need be proved only by a preponderance of the evidence.

There is some more evidence of the kind we've just been discussing, that is, evidence of explicit agreement, and other economic evidence as well that bolsters the plaintiffs' case, evidence for example that ADM had

significant ownership interests in two of the other defendants. But we can stop here because the evidence that we have summarized would have been enough to enable a reasonable jury to infer that the agreement to fix prices was express rather than tacit. The evidence is not conclusive by any means – there are alternative interpretations of every bit of it – but it is highly suggestive of the existence of an explicit though of course covert agreement to fix prices.

But there is one more piece of evidence that we do have to discuss because it was the subject of an evidentiary ruling that the plaintiffs challenge. After Andreas and Wilson were convicted and sent to prison for fixing the price of lysine, the plaintiffs deposed them and asked them whether they had fixed prices of HFCS as well. They (along with a third executive of ADM) refused to answer, on the ground that their answers might incriminate them. The general rule is that an adverse inference may be drawn from such a refusal in a civil case, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Harris v. City of Chicago*, 266 F.3d 750, 753 (7th Cir. 2001); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 389-91 (7th Cir. 1995), though of course the district judge retains his general power under Fed. R. Evid. 403 to exclude relevant evidence if its probative value is clearly outweighed by (so far as relevant here) its capacity to confuse the jury. Without referring to the rule, the district judge ruled the evidence of the deponents' silence inadmissible because the three had refused to answer *any* substantive question, so that, the judge reasoned, no inference could be drawn from their refusal to answer questions about the alleged HFCS price-fixing conspiracy, at least in the absence of other evidence

of such a conspiracy. But there *was* other evidence, as we have just seen.

The deeper problem with the judge's ruling is that it assumes that a person has carte blanche by virtue of the Fifth Amendment's self-incrimination clause to refuse to answer questions. The assumption is incorrect. To be privileged by the Fifth Amendment to refuse to answer a question, the answer one would give if one did answer it (and answer it truthfully) must have *some* tendency to subject the person being asked the question to criminal liability. E.g., *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980); *United States v. Warner*, 830 F.2d 651, 656 (7th Cir. 1987); *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *United States v. Reis*, 765 F.2d 1094, 1096 (5th Cir. 1985) (per curiam); compare *Sanchez v. Gilmore*, 189 F.3d 619, 624 (7th Cir. 1999). The fact that Andreas and Wilson were in prison for having fixed prices for lysine would not have authorized them to invoke the Fifth Amendment if asked whether they had helped Richard III kill the little princes and bury them in the Tower of London. Andreas and Wilson had been convicted and sentenced for their role in the other price-fixing conspiracies and had exhausted their appellate remedies. They faced no further jeopardy – unless truthful answers to questions about the HFCS conspiracy would have tended to show that ADM had conspired to fix the price of that product as well. That would justify and explain their taking the Fifth and it would also entitle a jury to treat their refusal to answer as evidence that there indeed was such a conspiracy.

The judge was correct that their refusal to answer could not be "imputed" to ADM, but imputation is not the issue. The issue is whether there was a conspiracy, and

Andreas's and Wilson's refusal to answer the plaintiffs' questions was one more piece of evidence that there was and that it involved their former employer, ADM, one of the defendants in this case. So it was admissible against ADM though not against the other defendants despite the coconspirator exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E). The rule is applicable only to statements in furtherance of the conspiracy, and when Andreas and Wilson refused to speak the conspiracy was long over. Even if they were trying to conceal the conspiracy, this would not make their silence in furtherance of it, because efforts at concealing a conspiracy are not themselves part of the conspiracy. E.g., *Grunewald v. United States*, 353 U.S. 391, 404-06 (1957); *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991).

In affirming Andreas's conviction for his role in the other price-fixing conspiracies, this court remarked "an inexplicable lack of business ethics and an atmosphere of general lawlessness that infected the very heart of" ADM, whose senior executives "lied, cheated, embezzled, extorted and obstructed justice." *United States v. Andreas*, *supra*, 216 F.3d at 650. Since evidence of past crimes, or of other bad acts committed in the past, is inadmissible to prove that the defendant probably is guilty of whatever he is now being charged with, merely because he has demonstrated a propensity to violate the law, Fed. R. Evid. 404(b), ADM's previous misconduct cannot be used as evidence that it participated in a conspiracy to fix the price of HFCS. But neither can it be used, as the defendants wish to use it in this case, to show that because the Justice Department has not moved against the alleged HFCS price-fixing conspiracy, there must not have been one. The Justice Department has limited resources; in the entire

decade of the 1990s, it brought fewer than 200 civil antitrust cases, an average of fewer than 20 per year. It brought more criminal antitrust cases, but the evidence in this case probably is not strong enough to establish the defendants' guilt beyond a reasonable doubt. With Andreas and Wilson in jail and a bright spotlight of suspicion shining on ADM and its competitors, the Department may have felt that there was little to be gained, so far as securing greater compliance with the Sherman Act was concerned, by suing these defendants for fixing the price of HFCS. It may also have felt that the antitrust class action bar had both the desire and the resources to prosecute such a suit vigorously, as indeed it has done. The evidence of the defendants' guilt is weaker in this case than in the lysine and citric-acid conspiracy cases, but not so weak as to justify summary judgment in their favor.

The upshot of our analysis of the evidence is that unless this opinion provides enough guidance to the parties to enable them to converge in their estimates of the likely outcome of a trial to the point at which settlement is feasible, there must be a trial; and we are naturally concerned about the practicability of a jury trial (the plaintiffs want and are entitled to a jury) in a case with such a staggeringly large record – the sealed exhibits alone fill 14 large boxes – that includes so much highly technical statistical material. We want to be realistic about the absorptive capacities of judges and juries. But actually the complexity of the case is largely illusory and a streamlined trial strikes us as eminently feasible. So far as the nonstatistical evidence is concerned, it is remarkable how little is in dispute. Most of the facts that we have recited in this opinion are not denied by the defendants;

their quarrel with the plaintiffs is merely over the inferences to be drawn both from individual pieces of evidence and from the evidence considered as a whole. It is an undenied fact, for example, that an internal document of Cargill contains the statement "entry of new entrants (barriers) and will they play by the rules (discipline)." The only question is the meaning. When basic facts of the who-said-or-did-what-to-whom kind are agreed upon and only the inferences to be drawn from those facts are in dispute, the judge can streamline the trial by requiring the parties to stipulate to the undisputed facts and present the stipulations to the jury, rather than allowing the lawyers to bore everyone by eliciting uncontradicted facts by means of protracted direct examination and cross-examination of witnesses, as if they were dentists pulling teeth the old-fashioned way. See Federal Judicial Center, *Manual for Complex Litigation* § 21.47 (3d ed. 1995).

Turning to the technical statistical evidence (not the data themselves, which for the most part are uncontested, but the inferences drawn from them by the use of statistical methodology), we recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts. See *Manual for Complex Litigation*, *supra*, § 21.51; *Ford ex rel. Ford v. Long Beach Unified School District*, No. 00-56438, 2002 WL 1059884, at *4 (9th Cir. May 29, 2002); *Meister v. Medical Engineering Corp.*, 267 F.3d 1123, 1125 and n. 3 (D.C. Cir. 2001); *Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999). The main objection to this procedure and the main reason for its infrequency are that the judge cannot be

confident that the expert whom he has picked is a genuine neutral. The objection can be obviated by directing the party-designated experts to agree upon a neutral expert whom the judge will then appoint as the court's expert. See Daniel L. Rubinfeld, "Econometrics in the Courtroom," 85 *Colum. L. Rev.* 1048, 1096 (1985). The neutral expert will testify (as can, of course, the party-designated experts) and the judge and jury can repose a degree of confidence in his testimony that it could not repose in that of a party's witness. The judge and jurors may not understand the neutral expert perfectly but at least they will know that he has no axe to grind, and so, to a degree anyway, they will be able to take his testimony on faith.

No doubt in view of the complexity of the case the judge will also want to bifurcate the trial, that is, to have a trial on liability first and only if the jury finds that the defendants violated the law to conduct a trial to determine the plaintiffs' damages.

If these suggestions are followed, we think the case can be tried in a reasonable amount of time and be made comprehensible to a jury.

We do not mean to prejudge the outcome of the trial. We have construed the evidence as favorably to the plaintiffs as the record permits because that is how a grant of summary judgment in favor of defendants is reviewed. Maybe the defendants could convince a jury that the spin that their brief puts on the evidence is the correct one. We hold only that there is sufficient admissible evidence in support of the hypothesis of a price-fixing conspiracy to prevent the grant of summary judgment to the defendants. We trust that guided by this opinion the parties will make every effort to settle the case in advance of trial. And

finally, although constrained to disagree with the district judge's decision to grant summary judgment, we commend him for his painstaking analysis of the record and for his patient shepherding of this formidable litigation.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION	)	MDL NO. 1087 and Master File No. 95-1477
THIS DOCUMENT RELATES TO ALL ACTIONS	)	

ORDER

This matter is now before the Court on various motions for summary judgment by Defendants. For the reasons set forth below, Cargill's Motion for Summary Judgment [# 630] is GRANTED; A.E. Staley's ("Staley") Motion for Summary Judgment [# 632] is GRANTED; American Maize's Motion for Summary Judgment [# 650] is GRANTED; and Archer Daniels Midland's ("ADM") Motion for Summary Judgment [# 652] is GRANTED.

BACKGROUND

I. *The Parties*

Plaintiffs are a consolidated class consisting of all U.S. purchasers of high fructose corn syrup ("HFCS") who purchased this product directly from any Defendant at any time during the period from July 21, 1991, through June 30, 1995.[1] Excluded from this class are governmental

[1] This case initially began as a number of separate class actions from across the country that were then consolidated before this Court for pretrial proceedings by the Judicial Panel on Multidistrict Litigation. Following the remand of a number of these cases for failure to

(Continued on following page)

entities, Defendants, subsidiaries/affiliates of Defendants, other HFCS producers and their subsidiaries/affiliates, and those purchasers who have opted out of the class. Defendants ADM, Cargill, Staley, and American Maize are United States based manufacturers and sellers of HFCS.[2] The HFCS industry in the United States is highly concentrated and is an oligopoly.[3]

ADM produced HFCS at corn wet milling plants in Clinton and Cedar Rapids, Iowa, and Decatur, Illinois. Cargill's HFCS plants were located in Cedar Rapids and Eddyville, Iowa, Dayton, Ohio, Memphis, Tennessee, and Blair, Nebraska (after August 1995). Staley produced HFCS at corn wet milling plants in Decatur, Illinois, Lafayette, Indiana, and Loudon, Tennessee. American Maize produced HFCS at plants in Decatur, Alabama, and Dimmitt, Texas. CPC's HFCS production was done at plants in Argo, Illinois, Winston Salem, North Carolina, Stockton, California, Port Colborne, Ontario, London, Ontario, and Cardinal, Ontario. During the time period relevant to this litigation, ADM, Cargill, Staley, American Maize, and CPC accounted for an average of more than

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satisfy the jurisdictional amount in controversy, 25 separate class actions plus *Gray & Co. v. ADM, et. al.*, a tag-along state case, remain before the Court.

[2] CPC International, Inc. ("CPC"), a named Defendant in this action, settled with the class early in the litigation. Roquette America, Inc., Golden Technologies Company, Inc., and Minnesota Corn Processors were also United States producers of HFCS during the conspiracy period but were not named as Defendants in this action.

[3] An oligopoly occurs when there is "[c]ontrol or domination of a market by a few large sellers, creating high prices and low output similar to those found in a monopoly." BLACK'S LAW DICTIONARY 1115 (7th Ed.1999).

90% of the production capacity for HFCS in the United States and Canada.

II. *The Product and Process*

HFCS is produced from corn and is used as a sweetener in various applications. In the initial milling process, corn is separated into "starch slurry" and corn co-products, which include corn gluten feed, corn gluten meal, and corn oil. Starch slurry can then be used to make a variety of products including HFCS, ethanol, dextrose, crystalline fructose, potable alcohol, industrial starch, and regular corn syrup. To produce HFCS, enzymes are added to the starch slurry to convert it into dextrose syrup. It can be manufactured to have various sweetener characteristics, depending on the percentage of fructose in the blend. HFCS producers manufacture two primary types of the product, HFCS 42, which contains 42% fructose, and HFCS 55, which contains 55% fructose. To create HFCS 42, another enzyme is added to the dextrose syrup; the HFCS 42 can then be blended with syrup containing a higher percentage of fructose to create HFCS 55.

Both HFCS 42 and HFCS 55 are commodities in that their characteristics do not change from producer to producer. HFCS 42 is used as a sweetener in products such as soft drinks, canned goods, baking products, condiments, jams, dairy products, and alcoholic beverages and is purchased by a broad range of customers, including food processors, confectioners, bakers, dairy producers, canners, and soft drink manufacturers. HFCS 55 is primarily used in the soft drink industry as a substitute for sugar but is also used in canned goods, fountain syrups, confectionery products, baked goods, dairy products, and

alcoholic beverages. Demand for HFCS is inelastic and cyclical because of seasonal changes in demand for products containing HFCS; demand peaks in the summer when sweetened beverage sales rise.

There is very little substitutability between corn syrup and HFCS, and the end uses for corn syrup differ from the end uses for HFCS. Although sugar was formerly used by the soft drink industry as a sweetener, the industry has since shifted to HFCS, as functional differences in many applications make HFCS preferable to sugar.

III. *The Industry*

Between 1988 and 1995, the industry's total HFCS output increased by 3.6 billion pounds. ADM increased its shipments by 13%, Cargill increased its shipments by 60%, Staley increased its shipments by 21%, American Maize increased its shipments by 37%, and CPC increased its shipments by 18%. HFCS producers also increased their HFCS finishing capacities;[4] ADM, American Maize, Cargill, CPC, and Staley increased their finishing capacities by 88.9%, 47.9%, 52.4%, 38.7%, and 33.2% respectively. During this same period, there were fluctuating market shares. Cargill's market share went from 20.8% in 1988 to 26.3% in 1991 to 25.6% in 1994. ADM's market share went from 30.6% in 1988 to 25.3% in 1991 to 26.6% in 1995. Staley's market share went from 22.3% in 1988 to 15.6% in

[4] Finishing capacity must be distinguished from grind capacity. Grind capacity is a measure of the amount of corn a mill can process into starch slurry, which then can be used to make several corn-derived products. A mill's finishing capacity is its ability to convert starch slurry into finished products, among which are HFCS 42 and HFCS 55.

1992 to 19.5% in 1994. Furthermore, capacity increased by more than the increase in demand.

Each of the Defendants was a member of the Corn Refiners Association ("CRA"), a trade association for members of the corn refining industry, and each had been a member prior to 1988. The CRA stems from a predecessor organization that was founded in 1913 and has a professional staff of nine persons, including a President, a Vice President, and directors of congressional affairs, communications, and technical affairs. The CRA's activities are conducted through a Board of Directors and several committees. Between 1988 and 1995, the members of the CRA sent their monthly grind and shipment figures for HFCS and other products (such as corn syrup, starch, and dextrose) to the accounting firm of Ernst & Young ("E & Y"), which was retained by the CRA to gather members' statistical data. E & Y combined the individual producers' data and transmitted only the aggregate numbers to the individual producers. Only the independent accountants at E & Y saw individual company data; none of the CRA staff or representatives of the corn refiner members saw individual company data. Monthly shipment information was then provided by the CRA to the U.S. Department of Agriculture and the Federal Reserve.

Defendants regularly published list prices for HFCS before, during, and after the alleged conspiracy period. Competitors' price lists were obtained from customers and industry observers. However, many large customers nevertheless bargained individually with producers on multi-year volume contracts or tolling agreements in order to receive discounts off the published list prices. A tolling agreement is an arrangement where a customer purchases corn and pays the HFCS producer a processing fee to

manufacture corn into HFCS, receiving a credit for sale of the co-products produced during the process; the parties negotiate the processing fee, and the customer assumes the risk of gains or losses associated with fluctuations in corn and co-product prices. Tolling agreements accounted for significant sales during the alleged conspiracy period. Defendants also contend that these large customers changed HFCS suppliers in order to obtain lower prices. Contracts for the purchase of HFCS are typically negotiated in the fall for the following year.

IV. *The Alleged Conspiracy*

In 1992, the Federal Bureau of Investigation ("FBI") began an undercover investigation of price fixing at ADM with the aid of Mark Whitacre ("Whitacre"), who was at that time the president of ADM's Bio-Products Division, the division which produced lysine.[5] Over the next two and a half years, Whitacre secretly made between 120 and 130 tapes of conversations and meetings in the lysine industry, none of which contained any recording of any employee of Cargill, Staley, CPC, or American Maize. The investigation culminated in an FBI raid on ADM's headquarters in June 1995. As a result of the investigation, ADM pled guilty to price fixing in the lysine industry, as well as the citric acid industry, and paid $100,000,000.00 in criminal fines; civil cases followed closely on the heels of the criminal proceedings. Additionally, three ADM executives, Michael Andreas ("Andreas"), Terry Wilson ("Wilson"), and Whitacre, were

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[5] Lysine is an amino acid used to stimulate an animal's growth that can be added to animal feed during the manufacturing process.

criminally prosecuted, convicted, and sentenced to prison. With the exception of ADM, none of the other Defendants involved in this case were implicated in either the lysine or citric acid conspiracies, and no indictments were returned with respect to HFCS.[6]

The Plaintiff class contends that beginning as early as 1988, Defendants, through their senior executives responsible for corn wet milling products, conspired to unlawfully fix prices in the HFCS industry in violation of § 1 of the Sherman Act. Like the conspiracies identified by the Department of Justice in the lysine and citric acid markets, the HFCS conspiracy was allegedly accomplished by these executives dictating prices to be quoted and charged to purchasers, limiting knowledge to a centralized core group of executives, negotiating inter-company purchases among themselves when required to balance volume discrepancies, attending CRA meetings to facilitate and conceal communications in furtherance of the conspiracy, and using the CRA to transmit information among the co-conspirators. The class also points to the fact that ADM owned 32% of American Maize's Class A stock and 27% of all outstanding shares, as well as the fact that it was the largest shareholder in Tate & Lyle, PLC, the parent company of Staley since 1988, as circumstances that promoted and furthered the conspiracy. The Plaintiff class argues that throughout the conspiracy period, Defendants' market shares were essentially stable, and substantial

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[6] Although Cargill was initially named as a defendant in the citric acid conspiracy, summary judgment was entered in its favor on January 23, 1998.

barriers prohibited other competitors from entering the HFCS market.

The Plaintiff class identifies certain pricing practices as circumstantial evidence of conspiratorial activity. Price announcements generally occurred within a few weeks after the CRA meetings, which Plaintiffs suggest were used as a cover for Defendants' secret price fixing conferences. Defendants also appear to have followed each others' lead with respect to HFCS pricing by offering similar list prices and utilizing the same pricing mechanisms, which shifted uniformly from time to time. Additionally, the Plaintiff class suggests that on several occasions, one or more of the Defendants refused to take advantage of opportunities to acquire the customer of another Defendant.

V. *This Litigation*

Following the consolidation of the individual class actions and the transfer of the Gray & Co. tag-along case to this Court, the class was certified, and a Consolidated Amended Class Action Complaint was filed on March 1, 1996. After years of extensive discovery, two major interlocutory appeals, and a substantial delay pending the release of tapes by the Department of Justice at the conclusion of its criminal grand jury investigations, the remaining Defendants have now moved for summary judgment. Plaintiffs have filed their response, and the Court entertained oral argument on June 21, 2001. The matter is now ready for resolution, and this Order follows.

LEGAL STANDARD

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir.1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex Corp.*, 106 S.Ct. at 2553. This Court must then determine whether there is a need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. Anderson, 106 S.Ct. at 2511.

"In determining whether a material factual dispute exists, the court views the evidence through the prism of the controlling legal standard." *Nebraska v. Wyoming*, 507 U.S. 584, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317 (1993). Here, that means the evidence must be viewed through the prism of antitrust law.

PRELIMINARY EVIDENTIARY RULINGS

In attempting to meet its burden on summary judgment, the Plaintiff class relies on two categories of evidence that are subject to objection; namely, statements derived from DOJ undercover tapes and FBI 302's (the "DOJ evidence") and the inferences to be drawn from the invocation of the Fifth Amendment by certain former ADM executives.

I. DOJ TAPES

A substantial portion of the Plaintiff class' case is based on evidence derived from the undercover tapes made with the assistance of ADM's Mark Whitacre. Although these tapes contain extensive evidence of conspiratorial activity in the lysine and citric acid conspiracies, HFCS is mentioned only tangentially in a handful of the hundreds of hours of taped conversations. All of the taped statements were made out of court, and there were no statements by employees or agents of Cargill, Staley, or American Maize.

Defendants argue that since the tapes are out-of-court statements, they constitute inadmissible hearsay. Moreover, since the taped conversations contain no statements by any employees or agents of Cargill, Staley, or American

Maize, they cannot be admitted as admissions against the interest of those Defendants.

Plaintiffs assert that the tapes are admissible under Rule 404(b) of the Federal Rules of Evidence, which provides for the admission of evidence of a party's other bad acts when introduced as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. . . . " Specifically, Plaintiffs contend that the DOJ tapes are probative of intent to conspire, motive, plan, and lack of mistake. While the Court agrees that the tapes could possibly be probative for these alternative purposes with respect to ADM, the same cannot be said for the remaining Defendants, who did not play any role in the recordings and are not even identified by name in any conversation.

In order for the tapes to be admissible against Cargill, Staley, and American Maize, they would have to be admitted as statements of a co-conspirator. Under Rule 801(d)(2)(E), out-of-court statements are not hearsay if they are offered against a party and are statements "by a co-conspirator of a party during the course and in furtherance of the conspiracy." The Seventh Circuit has identified three elements that must be established by a preponderance of the evidence in order to qualify for admission under 801(d)(2)(E):

> (1) the existence of a conspiracy; (2) that the person making the statement was involved in the conspiracy; and (3) that the statement was made "during the course and [in] furtherance of the conspiracy."

Stagman v. Ryan, 176 F.3d 986, 997 (7th Cir.1999), *citing Garlington v. O'Leary*, 879 F.2d 277, 280 (7th Cir.1989).

As set forth below, the Court finds that Plaintiffs have failed to adequately demonstrate the existence of the HFCS conspiracy alleged, much less the participation of any of the taped individuals in a HFCS conspiracy. Moreover, even assuming that a conspiracy had been adequately proven by a preponderance of the evidence, the nature of the conversations recorded cannot reasonably be said to have been statements made in furtherance of the conspiracy, as the conversations relate primarily to either lysine or citric acid and reference HFCS only in a sparse, tangential, and ambiguous manner. There is nothing contained in the tapes offered as evidence in this case which could reasonably be construed as "part of the information flow between conspirators intended to help each perform his role." *Garlington*, 879 F.2d at 283; *United States v. Godinez*, 110 F.3d 448 (7th Cir.1997). Accordingly, the Court finds that the evidence contained in the DOJ tapes is inadmissible against Cargill, Staley, and American Maize.

The Court now turns to the question of whether this evidence is admissible against ADM. Unlike the situation with the other Defendants, the DOJ tapes contain statements by ADM's employees and agents that implicate them in other antitrust conspiracies.

> When evaluating the admissibility of other acts under Rule 404(b), this court uses a four-prong test that incorporates the relevancy aspect of Rule 403: (1) the evidence of the other act must address a matter in issue other than the defendant's propensity to commit the crime charged; (2) the other act must be similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence of the other act must be sufficient for the jury to find that the defendant

> committed the other act; and (4) the other act must have probative value that is not substantially outweighed by the danger of unfair prejudice.

United States v. Poole, 207 F.3d 893, 897 (7th Cir.2000).

Here, the Court has already acknowledged that the tapes could address matters other than ADM's propensity to violate the antitrust laws; namely, intent, motive, plan, and absence of mistake. The questions of whether the other act is similar enough to be relevant and whether any probative value is substantially outweighed by the danger of unfair prejudice are much closer questions, as the record reveals substantial differences between the way the lysine and citric acid conspiracies operated and the facts with respect to what happened in the HFCS industry.

Unlike the lysine and citric acid conspiracies, there is no direct evidence of wrongdoing in the record before the Court, and although the HFCS market was the alleged model for the other two conspiracies, the circumstantial evidence does not readily conform to the asserted pattern. In the lysine and citric acid conspiracies, ADM has admitted to having conspired with foreign companies; the HFCS conspiracy alleged involves only United States based manufacturers. In the other conspiracies, trade associations were used as a cover for illegal meetings, with the sham trade association in the lysine industry even having been created expressly for that purpose. The lysine and citric acid conspirators used the same mechanisms for monitoring market share and compensating one another for exceeding the agreed-on shares. Monthly sales figures were forwarded to one of the conspirators, who then forwarded each member's information to the other conspirators so that each could monitor the market shares of

the other conspirators and determine what corrective action needed to be taken at the end of the year. There was no such mechanism in the HFCS industry.[7] The other conspiracies also had very precise specifications and mechanisms in place to balance any discrepancies between the agreed-upon volumes and actual volumes which are not present in this case.[8] On the other hand, some of the same ADM individuals who were involved in those cases are also alleged to have been involved in this case; namely, Andreas and Wilson. The conduct occurred at roughly the same time as the conspiracy alleged in this case and involved similar allegations of price fixing and volume allocation.

Where evidence is admitted to show knowledge, intent, motive, or plan, "the prior acts need not be duplicates of the one for which the defendant[s are] now being tried;" the similarity requirement is met when prior acts share common characteristics that relate to the purpose for which the evidence is offered. *United States v. Long*, 86

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[7] Plaintiffs have suggested that this information could have been filtered through the monthly reporting of information that was sent through the CRA. As set forth more fully below, this assertion is not supported by the record, which reveals that only an independent accounting firm ever saw the individual data; Defendants received only aggregate data and could not have monitored each others' market shares with this information. Additionally, there were other non-Defendant members of the CRA whose information would also have been included in these aggregate figures.

[8] As set forth more fully below, the handful of transactions which Plaintiffs claim were to "balance the deal" would have been woefully inadequate and cannot readily be reconciled with the market share data. The inter-Defendant sales identified were not of sufficient magnitude to remedy the losses of market share suffered.

F.3d 81, 84-85 (7th Cir.1996). Although there are substantial differences between the conduct alleged in the lysine and citric acid cases and the facts of record in this case, the Court nevertheless finds by the barest of margins that the other acts evidence is sufficiently similar to have some relevance under the second prong of the test set forth in *Poole*.

That being said, the 404(b) evidence must still have probative value that is not outweighed by the danger of unfair prejudice. Such evidence has been found to be unfairly prejudicial where the admission of the evidence "invokes horror or emotional responses" or "makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented. . . . " *United States v. Adames*, 56 F.3d 737, 742 (7th Cir.1995); *Young v. Rabideau*, 821 F.2d 373, 377 (7th Cir.1987). While all bad acts evidence is to some degree prejudicial, and there is some danger that this evidence could be considered as demonstrating ADM's propensity to fix prices and the probative value of such evidence is far from compelling, the Court cannot find that the danger of unfair prejudice outweighs the probative value and declines to impose the blanket exclusion sought by ADM.

II. FBI 302's

Defendants move to exclude as hearsay the report forms on which the FBI agents have summarized statements made by witnesses during the course of the investigation, specifically summaries of interviews with Whitacre while he was cooperating with the investigation of ADM. In their brief, Plaintiffs only appear to seek the

admission of one FBI 302 report that purports to document a statement given by Whitacre on September 28, 1993, which relates a conversation he participated in earlier that day.

The FBI 302 reports are clearly hearsay under Rule 801 of the Federal Rules of Evidence since they are out-of-court assertions and, contrary to Plaintiffs' argument, are in fact being offered for the truth of the matter asserted; the question is whether there is any applicable exception. Plaintiffs argue that the report is admissible as a present sense impression, which provides an exception for statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Fed.R.Evid. 803(1). While this may provide an exception for Whitacre's same-day relation of the conversation that he participated in on September 28, 1993, the report is actually triple hearsay, as it represents an agent's documentation of the statement by Whitacre recounting a comment that was purportedly made by Andreas. In instances of multiple hearsay, the proponent must provide an exception for every link in the hearsay chain.

Plaintiffs make reference to Andreas' alleged statement as an admission against interest. Assuming that Plaintiffs' proffered version of the Andreas comment is correct and that the original Andreas comment itself could qualify as an admission against interest, the final link (that is, the actual preparation of the written report some period of time later by the FBI agent) remains unsatisfied. It is worth noting that the 302 report is just that – a report, not an affidavit or a deposition. As Plaintiffs have failed to offer an exception for the last link in this hearsay

chain, the report in question is inadmissible and will not be considered for purposes of this motion.

III. FIFTH AMENDMENT INFERENCES

Plaintiffs argue that they are entitled to adverse inferences because Andreas, Wilson, and Barrie Cox ("Cox"), ADM's Vice President of its Food Additives Division, have invoked their Fifth Amendment rights and refused to answer questions during their depositions on advice of counsel. Generally, invoking the Fifth Amendment in a civil context permits an inference that the witness' testimony would be adverse to his interests. *Central States, Southeast and Southwest Areas Pension Fund v. Wintz Properties*, 155 F.3d 868, 872 (7th Cir.1998), *citing Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Such an inference may be drawn but does not necessarily need to be drawn. Daniels v. Pipefitters' Association Local Union No. 597, 983 F.2d 800, 802 (7th Cir.1993). Factors to consider include the nature of the relevant relationships, the degree of control of the party over the non-party witness, the compatibility of the interests of the party and non-party witness in the outcome of the litigation, and the role of the non-party witness in the litigation. *LiButti v. United States*, 107 F.3d 110, 123-24 (2d Cir.1997).

Here, Plaintiffs argue that they are entitled to adverse inferences against all Defendants because three former employees of one corporate Defendant refused to answer substantive questions during their depositions; no employees of Cargill, CPC, American Maize, or Staley invoked the Fifth Amendment in their depositions. Although they are

correct in the assertion that a non-party witness' invocation of the right not to testify is admissible and may result in the drawing of an adverse inference under certain appropriate circumstances, the Court finds that this case does not present such appropriate circumstances.

During their depositions, Andreas, Wilson, and Cox repeatedly invoked their Fifth Amendment right against self-incrimination for every question asked. "Once a [witness] invokes the Fifth Amendment for any question, it is [his] right to invoke it for all questions." *In re Citric Acid Litigation*, 996 F.Supp. 951, 961 (N.D.Cal.1998). Under these circumstances, it is "impossible to draw a negative inference from his refusal to answer any given question, as it would be if his assertion of the privilege had been selective." *Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc.*, 1996 WL 535083, at *17 (N.D.Ill.1996), *citing Brinks, Inc. v. City of New York*, 717 F.2d 700, 716 (2nd Cir.1983). In reaching this conclusion in *Ullman Briggs*, the court noted:

> Once it became apparent to [the] questioner that he would invoke the fifth amendment privilege with respect to any question whatsoever, counsel would then be able to fashion questions in such a way as to be able to create the most damaging testimony through negative inference, "safe from any contradiction by the witness no matter what the actual facts."

Ullman-Briggs, 1996 WL 535083, at *17.

That is precisely what would occur in this case if Plaintiffs were allowed to draw the inferences requested. Many of the questions were phrased in such a way that they could not be answered without subjecting the

witnesses to the potential of further criminal liability. As such, the only trustworthy inference that can be drawn from these witnesses' invocation of their right to remain silent in response to these questions is that they were refusing to address whether they engaged in the conduct alleged in each question, particularly in light of the absence of other evidence in the record confirming Plaintiffs' conspiracy theory as set forth more fully below.

Moreover, Plaintiffs want to assert these adverse inferences against not only the former corporate employer of these witnesses but also against the other named Defendants, which were completely separate corporate entities with no relationship to or control over these witnesses. The Court is unaware of any authority suggesting that this drastic extension of the concept would be appropriate, and Plaintiffs have not otherwise cited any precedent to this effect.

Under the circumstances and evidence present in this case, the Court concludes that no trustworthy inference of conspiratorial conduct can fairly be drawn from the depositions of Andreas, Wilson, and Cox without resorting to bald speculation or conjecture. *See LiButti*, 107 F.3d at 124 ("finding that the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.")

DISCUSSION

Section 1 of the Sherman Act prohibits "conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. A civil plaintiff asserting a Section 1 claim must establish: "(1) a contract, combination, or conspiracy; (2) a resultant

unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1220 (7th Cir.1993).

The Plaintiff class can establish a genuine issue of material fact by producing either direct evidence that Defendants conspired to fix prices in the HFCS industry or circumstantial evidence from which a reasonable fact finder could conclude that Defendants conspired. Direct evidence in this context is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 118 (3rd Cir.1999). Plaintiffs set forth in their brief six examples of purportedly direct evidence: (1) an April 28, 1993 statement by Terry Wilson that, for secrecy, ADM should minimize the number of expense reports created and should not show the true nature of the meeting or the people involved; (2) a September 23, 1993, statement by Michael "Mick" Andreas to the effect of, "What are you gonna tell Keough, that we gotta deal with two, our two biggest competitors to f--- -ya over"; (3) a March 1992 statement by Staley's plant director of operations that, "We have an understanding within the industry not to undercut each others' prices"; (4) a statement by a Staley salesman that Staley could not quote a price because his boss was at an industry meeting and the pricing would not be determined until after his boss returned from that meeting; (5) a statement by Mick Andreas in October 1993 that a then director of Staley's parent company had made a statement to a member of the lysine conspiracy that "every business I'm in is an organization"; and (6) a handwritten Cargill document stating, "entry of new entrants (barriers) and will they play by the rules (discipline)."

Plaintiffs apparently saw the weakness of their assertion that any of these constitutes direct evidence and effectively abandoned any such position during the oral argument in this case. This was a wise decision, as the Court has reviewed the examples of supposed direct evidence and finds that each of the six examples purportedly indicating that Defendants participated in a HFCS price fixing conspiracy would also require that a substantial inference be drawn in order to have evidentiary significance. Accordingly, the Plaintiff class must attempt to make its proof through circumstantial evidence.

In *Matsushita Electrical Industrial Co. v. Zenith Radio Corporation*, the Supreme Court set forth an antitrust plaintiff's burden in resisting a summary judgment motion. 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Although the Court must generally draw any reasonable inferences from underlying facts in the light most favorable to the non-moving party, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case" in that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 587-88, 106 S.Ct. 1348. In order to survive a motion for summary judgment, a plaintiff must "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* at 588, 106 S.Ct. 1348. In other words, a plaintiff relying on circumstantial evidence "must show that the inference of conspiracy is reasonable in light of the competing inference of independent action." *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 599 (7th Cir.1995), *citing Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348.

The Seventh Circuit subsequently elaborated on the teachings of Matsushita and developed a three-part methodology for addressing antitrust conspiracy claims on summary judgment.

> We first review the evidence of conspiracy submitted by the plaintiff. Next, we examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the defendant as it is with illegal conspiracy. Finally, if we determine that this analysis leaves the evidence of the conspiracy ambiguous, we determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.[9]

Serfecz, 67 F.3d at 599, *citing Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171-72 (7th Cir.1990). In 1999, the Seventh Circuit essentially reaffirmed this standard in *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 787 (7th Cir.1999), in which the court acknowledged that in a circumstantial evidence case, it was ultimately necessary for the plaintiff "to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual action."

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[9] In some circuits, this additional evidence is referred to as a "plus factor" *See Petruzzi's IGA v. Darling-Delaware*, 998 F.2d 1224, 1242-44 (3rd Cir.1993); *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 (11th Cir.1991).

Plaintiffs contend that the test set forth in Serfecz is no longer applicable, citing to *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). However, *Eastman Kodak* does not directly address the standard articulated in *Serfecz*, and the *Serfecz* case, which was decided three years after *Eastman Kodak*, is binding on this Court unless otherwise overruled or vacated. In support of the assertion that the *Serfecz* standard has been vacated, Plaintiffs cite to two more recent Seventh Circuit cases, *JTC Petroleum Company v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir.1999), and *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir.2000).

In *JTC*, the plaintiff sued road contractor applicators and producers of emulsified asphalt in southern Illinois, alleging violations of Sections 1 and 2 of the Sherman Act in the road repair business. 190 F.3d at 776. When construing the record in the light most favorable to the plaintiff, the court found that the plaintiff had presented both direct and circumstantial evidence that the road contractor applicators had agreed not to compete with one another in bidding local government contracts and also that the asphalt producers had agreed among themselves not to compete to survive summary judgment. *Id.* at 777. The Seventh Circuit noted that conflicts with respect to disputed evidence must await resolution at trial but did not appear to find the evidence of conspiracy to be ambiguous or otherwise attempt to provide guidance with respect to what inferences could permissibly be drawn. *Id.* at 778-79. Thus, it would not appear that the decision in *JTC* is inconsistent with the standard articulated in *Serfecz*, and in fact, the opinion in *JTC* expressly cites and

relies on *Market Force*, which forms the basis for the standard in *Serfecz*.

Toys "R" Us was in an entirely different posture from the present situation. The Federal Trade Commission ("FTC") conducted an antitrust investigation into an alleged boycott in the retail toy market and found both vertical and horizontal restraints on trade; the case was presented on appeal from the FTC's administrative decision and remedy. *Toys "R" Us*, 221 F.3d at 930. The Seventh Circuit again cited to *Matsushita* for the proposition that an antitrust plaintiff relying on circumstantial evidence must show some evidence that "'tends to exclude the possibility' that the alleged conspirators acted independently" or "which, if believed, would support a finding of concerted behavior." *Id.* at 934-35. As the FTC was able to present direct evidence, and the court's function on appeal was to review the administrative record under a substantial evidence standard, there was no detailed discussion of what inferences may permissibly be drawn from the facts or how to handle ambiguous evidence. *Id.* Accordingly, the Court finds that this case adds little weight in support of the Plaintiff class' suggestion that *Serfecz* and *Market Force* are no longer good law in this circuit.

JTC and *Toys "R" Us* both involved cases that were at least in part based on direct evidence, which is a significant distinction from the purely circumstantial case now before the Court.[10] It was therefore unnecessary for the

[10] It would appear from the factual recitation in these cases that there was also a qualitative difference in the circumstantial evidence presented.

court to address the questions of permissible inferences and ambiguous evidence. In fact, the analysis in both of these cases arguably ended after the second step of the *Serfecz/Market Force* analysis with a finding that the evidence of conspiracy was not ambiguous, which would make *JTC* and *Toys "R" Us* consistent with prior law in the circuit. As such, the Court finds it unlikely that the Seventh Circuit would have used these cases as a vehicle to vacate or overrule sub silentio its prior detailed decisions with respect to how a district court should address purely circumstantial evidence of antitrust conspiracy on summary judgment.

This interpretation is also consistent with the law in other circuits. For example, in addressing the citric acid conspiracy, the Ninth Circuit outlined a two-part test. *In re Citric Acid Litigation*, 191 F.3d 1090, 1094 (9th Cir.1999).

> First, the defendant can "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior.

Id. Although the Ninth Circuit phrased its test somewhat differently from the Seventh Circuit's statement in *Serfecz*, the difference is one without substance, as the essence of the standard is the same as that articulated in *Serfecz* and *Market Force*. *See also*, *In re Baby Food Antitrust Litigation*, 166 F.3d at 121-23; *Blomkest Fertilizer, Inc. v. Potash Corporation of Saskatchewan*, 203 F.3d 1028, 1032-33 (8th Cir.2000); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 569-71 (11th Cir.1998).

The Plaintiff class has described the alleged conspiracy as involving the following conduct:

> [R]each agreements to fix prices and allocate volumes at meetings held under the cover of an industry trade association and monitor and enforce the agreements through monthly reporting of sales so that companies getting out of line can adjust as they go along and, if necessary, be compensated at the end of the year through inter-defendant purchases.

(Class Plaintiffs' Corrected Consolidated Opposition at 77.) They note that these same fundamental elements also characterize the lysine and citric acid conspiracies and that the HFCS conspiracy was used as an example in structuring the lysine agreement. *Id.*

In attempting to meet their burden of proof, the Plaintiff class relies on both conduct and economic evidence. Although some of the record may be discussed piecemeal, the Court is nevertheless mindful of its obligation to weigh the evidence as a whole in that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Company v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

I. CONDUCT EVIDENCE

There are numerous examples of purported conduct evidence identified by Plaintiffs. In March 1988, ADM announced that HFCS 42 would be priced at 90% of HFCS 55 prices (the "90% rule"), and all other Defendants

quickly followed suit. In September 1988, Defendants publicly announced that they would price HFCS on a quarterly basis rather than through annual supply contracts; moreover, executives at ADM and Staley made statements prior to that announcement that Plaintiffs suggest indicate an awareness that the shift to quarterly pricing would, in fact, occur. Various high-level executives from each of the Defendant companies regularly attended meetings of the CRA, at which Plaintiffs assert that price fixing must have been discussed. These same executives had other opportunities for communication in furtherance of the conspiracy, such as phone calls and social dinners. Beginning in December 1988 and continuing through the alleged conspiracy period, Defendants regularly announced list prices that were nearly identical to each other.

In 1990, Cargill's share of the market increased, while ADM's and Staley's shares decreased; that same year, Cargill bought HFCS from ADM and Staley, which Plaintiffs suggest was to make amends for its increased market share.[11] In 1991, Cargill again increased its share of the market, while ADM's share went down, and Cargill purchased additional HFCS from ADM between March and June of that year.

In June 1991, Pepsi chose not to buy HFCS 55 from ADM; when Pepsi then tried to increase its supply from other producers, Staley refused to increase its sales to

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[11] During oral argument, the Court noted its concern that Plaintiffs appear to have "cherry-picked" a few transactions from the many transactions of record that they deem to be illustrative of their position.

Pepsi despite excess capacity. In the fall of 1991, Pepsi asked Staley to reduce its prices for HFCS 55, and after failed negotiations, Staley refused to sell to Pepsi at all in 1992.[12] ADM then purchased HFCS from Staley in 1992 and 1993 and contributed money toward the building of a starch slurry pipeline between the Staley and ADM headquarters, both of which are located in Decatur, Illinois, which Plaintiffs suggest were compensation for Staley's loss of the Pepsi business. In 1995, Staley increased its market share and made purchases from ADM and Cargill to "balance the deal."

A growing spread between list prices and the actual transaction prices between 1989 and 1993 purportedly evidences "cheating" from the agreed-to prices by the conspirators. Plaintiffs then point to rebates that ADM and Cargill issued to some of their customers separate from their normal invoices as evidence of further "cheating" by ADM and Cargill.

In October 1993, Cargill announced that it would again offer annual pricing for HFCS, and the other Defendants followed suit shortly thereafter. Following a CRA meeting in November 1993, Defendants issued announcements withdrawing annual pricing and reinstating the quarterly pricing.

In 1994, price levels continued to increase, which Defendants attribute to the 1993 flood in the midwest.

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[12] The record indicates, however, that Pepsi was able to obtain the HFCS 55 that Staley would have provided from its competitors, Cargill and American Maize.

Plaintiffs argue that the price increase is actually indicative of a conspiratorial intent to increase margins, as there were few deviations from list price and no producer responded to a request from Pepsi to obtain more volume in return for lower prices. Cargill also refused to quote prices for increased volume to Coca Cola and declined business from Heilemann. The Plaintiff class then points to statements by lower-level employees at ADM, Staley, Cargill, and American Maize that they were frustrated at not being able to effectively pursue new customers, as well as the perceptions of buyers in the industry that the suppliers were uniformly unwilling to reduce prices in exchange for increased volumes.

Finally, Plaintiffs point to what they deem to be barriers to entry into the market. In 1993 and 1994, Minnesota Corn Processors ("MCP") and Pro-Gold entered the HFCS market. ADM, Staley, CPC, and Cargill each tried to dissuade MCP from producing HFCS or entering into a joint venture agreement for its production/ distribution. Similarly, ADM and Cargill made efforts to discourage Pro-Gold. Each category of the purported conduct evidence will be addressed in turn.

A. *Parallel Pricing Decisions*

Plaintiffs cite to the 90% rule, the shift to quarterly pricing, the announcement of a return to annual pricing followed shortly thereafter by the recission of annual pricing, the regular announcement of list prices that were nearly identical to each other, and the circulation of price lists as evidence of collusive pricing. Defendants respond that the identified instances of pricing implicate only list prices, which were paid by a handful of small customers,

while the majority of sales were actually made pursuant to individually-negotiated tolling agreements.

1. 90% Rule

In 1987 and 1988, HFCS 42 list prices were less than 90% of HFCS 55 list prices and were decreasing relative to the HFCS 55 prices. On March 16, 1988, ADM announced that HFCS 42 would be priced at 90% of HFCS 55 prices. This announcement was then followed by similar announcements from CPC, American Maize, Cargill, and Staley on March 21, 1988, March 25, 1988, May 1988, and May 2, 1988, respectively. Plaintiffs point to acknowledgments by Robert Heard ("Heard"), ADM's Vice President of Sales and Marketing, and John Doxie [sic] ("Doxie [sic]"), Staley's Vice President of Sweetener Sales and Logistics, that if one of the HFCS producers had refused to adopt this pricing mechanism, then the rule could not have been implemented; they also note the statement by William Ducey ("Ducey"), Director of Sales for Maize Sweetener Group, that the 90% rule became an industry formula. However, these statements amount to nothing more than candid observations of the realities of an oligopolistic market and add nothing to Plaintiffs' side of the scale.

Plaintiffs then cite ADM Exhibit 325 as support for their contention that these pricing practices are evidence of collusion. This document is a June 1988 "Authorization for Expenditure" prepared by an ADM engineer seeking authorization for funds to debottleneck ADM's refinery in order to increase HFCS 42 capacity while still operating the HFCS 55 portion of the plant at full capacity "to keep pace with fructose industry growth." (Defendants' Joint Appendix, Ex. 60.) The document then states that, "[i]t is

anticipated that the current practice of pricing [HF]CS 42 on an annual basis will not be offered in 1989 and [HF]CS 42 margins will realistically be equal to those realized on [HF]CS 55." *Id.* Defendants note that this document cannot reasonably be interpreted as indicating the certainty of future action that Plaintiffs suggest, particularly as the document was not prepared until nearly a month after Defendants had already published list price announcements showing the 90% ratio. Even when construed in the light most favorable to the Plaintiff class, the Court finds that the "Authorization for Expenditure" reveals nothing more than an anticipation of ADM's pricing decisions. It does not even mention an industry trend or any other producer, let alone suggest an agreement among the producers.

Plaintiffs then argue that the shift to 90% pricing for HFCS 42 made no economic sense because once ADM announced its increased pricing, the other producers could have undercut that price to gain additional HFCS 42 sales. However, Heard testified in his deposition that ADM shifted to the 90% ratio because HFCS 42 prices had dropped significantly below HFCS 55 prices, and some customers were beginning to switch to the less costly variety; ADM adopted the 90% rule to equalize its margins between the two products. (Heard Dep. at 149.) Staley and Cargill considered 90% to represent a fair estimate of the perceived relative sweetener levels. (Doxsie Dep. at 84; Cotter Dep. at 207-09.) William Ducey, American Maize's Director of Sales for its sweetener group, and Frederic Ash, its Vice President of Marketing and Sales, both stated that American Maize then simply followed the market. (Ducey Dep. at 76-77; Ash Dep. at 20.)

While Plaintiffs take issue with the technical accuracy of the various explanations offered by the Defendants for adopting the 90% rule, there is no evidence of communications regarding the move to a 90% ratio among the producers or any other evidence suggesting anything other than follow-the-leader pricing, let alone evidence tending to exclude the possibility that the Defendants were pursuing their legitimate, independent interests by raising the price of HFCS 42 rather than lowering the price of HFCS 55 to equalize margins and maximize profits. The conduct identified by Plaintiffs in and of itself is simply an illustration of a follow-the-leader effort to maximize profit margins on HFCS 42, and there is nothing illegal about a seller's conscious choice to maximize profit margins on a product rather than dropping its prices to sell more volume. *See In re Potash Antitrust Litigation*, 954 F.Supp. 1334, 1363 (D.Minn.1997), *aff'd*, 203 F.3d 1028 (8th Cir.2000) (rejecting as "unfounded supposition" the suggestion that low cost producers could not rationally decide to sacrifice an opportunity to gain market share in favor of receiving higher product prices.)

2. Quarterly Pricing

Similarly, Plaintiffs have seized upon the shift to quarterly pricing, which proceeded along a similar pattern with ADM announcing its intent to price on a quarterly rather than annual basis and the other producers following suit thereafter, as evidence of collusion. They note the fact that customers opposed quarterly pricing, preferring the certainty of annual pricing, and that all producers had to make the shift in order for it to be successful, compelling the inference that the shift was the result of collusion.

Plaintiffs refer to the fact that there was a CRA meeting on June 7-8, 1988, and ask the Court to draw the inference that this was a cover for Defendants to reach an agreement to implement quarterly pricing. Similarly, the Plaintiff class argues that price fixing must have been discussed on June 19, 1988, when ADM's Terry Wilson and American Maize's Patric McLaughlin met for cocktails and/or dinner in Chicago, Illinois, and in June or July 1988, when ADM's Mick and Dwayne Andreas had dinner with Staley's Larry Cunningham at the Decatur Country Club. However, there is not one iota of evidence to confirm the bald speculation that an agreement was reached or even discussed on any of these occasions, and it is well established that mere opportunities to conspire are insufficient to support an inference of conspiracy, as they "do not tend to exclude the possibility of legitimate activity." *In re Citric Acid*, 191 F.3d at 1103; *In re Baby Food Antitrust Litigation*, 166 F.3d at 126 (finding that "communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise'"); *Blomkest*, 203 F.3d at 1033-34.

An October 1988 speech by Staley's Doxie is cited for the statement that he "expect[ed] HFCS to be offered for sale in 1989 on a quarterly basis at price levels that average well above 1988 levels." Plaintiffs then point to the portion of ADM Exhibit 325 which states, "It is anticipated that the current practice of pricing [HF]CS 42 on an annual basis will not be offered in 1989." They also note an August 17, 1988, draft operating plan for Staley which contained the comment, "We will announce and support efforts to limit corn syrup, 42% HFCS and 55% HFCS pricing to a quarterly basis." As the Court previously

concluded with respect to the 90% rule, the statement in ADM Exhibit 325 reasonably reflects nothing more than an anticipation of ADM's pricing decisions. The same is true of Doxie's prediction of Staley pricing in his October 1988 speech, as well as the Staley operating plan, which is Staley's own internal policy and makes no reference to any other producer or industry policy.

In direct contrast to Plaintiffs' suggestion that Defendants switched to quarterly pricing as part of the conspiracy in late 1988, Defendants have offered uncontradicted evidence indicating that HFCS 55 was already being priced on a quarterly basis prior to the alleged conspiracy period. Specifically, they offer the following testimony: (1) Norbert Cremers, ADM's Vice President for Sweeteners, stated that ADM had used quarterly pricing long before and returned to that practice in the late '80s (Cremers Dep. at 127); (2) Gary Jordan, then Coca-Cola's Director of Purchasing, testified that he recalled quarterly price negotiations for HFCS during his employment in the early '80s (Jordan Dep. at 38); and (3) Clint Cutsforth of CPG and Wis-Pak recalled both annual and quarterly pricing mechanisms during his employment from the early '80s through 1990 (Cutsforth Dep. at 124). In fact, the use of quarterly pricing in the HFCS industry was recognized in a finding of fact in a 1991 court opinion involving ADM. *United States v. Archer-Daniels Midland Co.*, 781 F.Supp. 1400, 1419 (S.D.Iowa 1991). Such a practice would also have been in the producers' self-interest, as pricing over a shorter period of time lessens the seller's exposure to increases in the price of corn and offers the opportunity to hedge against fluctuations in corn price. Plaintiffs also fail to adequately refute Defendants' evidence demonstrating that despite the general switch to quarterly pricing, many

individual purchasers nevertheless negotiated agreements for the purchase of HFCS priced on an annual or multi-year basis via tolling agreements or other contracts.

Additionally, Plaintiffs suggest that collusion is evident from the fact that Defendants announced in late October and early November 1993 that they would again formally offer annual pricing but rescinded their offers of annual pricing shortly after a November 12, 1993, CRA meeting. Again, the mere opportunity to conspire, without more, is insufficient to support an inference of conspiracy. Plaintiffs have offered no evidence indicating that pricing mechanisms were discussed at this meeting and fail to rebut Defendants' assertion that the rescission was due to a November 9, 1993, USDA report predicting the smallest corn harvest since the 1988 drought and the fact that the price of corn futures rose so precipitously on November 10, 1993, that the market's upper trading limits were triggered. In light of an uncertain corn harvest, it would have been in each Defendant's unilateral self-interest to minimize its exposure and risk by committing only to quarterly pricing contracts.

3. Substantially Similar List Prices

In this case, it is undisputed that Defendants' price lists often contained similar or sometimes identical prices. Plaintiffs offer this as evidence of a conspiracy to fix prices. Defendants respond that Plaintiffs' reliance on list prices is misplaced because it ignores the realities of the HFCS industry, where large customers generally bargain individually with producers to receive discounts off list

price and often enter into multi-year contracts or tolling agreements.[13] Representatives from Heinz and Ocean Spray testified that they have never paid list price for HFCS, while a representative from Pepsi stated that list prices were not part of his purchasing discussions with the producers. (James McDonough Dep. at 73; William Johnson Dep. at 22; Nicholas Guarino Dep. at 86.) Defendants have also submitted graphic evidence demonstrating that actual transaction prices for both HFCS 42 and HFCS 55 were widely varied throughout the alleged conspiracy period. (Defendants' Joint Appendix, Tab 115.)[14] Moreover, in a highly oligopolistic industry, the issuance of identical price lists is not sufficient to establish collusion. Hon. Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STANFORD LAW REVIEW 1562, 1581-82 (1969).

> The fact that a standard product is priced according to a standard formula does not indicate that a conspiracy exists; one manufacturer could have

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[13] Between 1987 and 1996, approximately 16% of ADM's HFCS 55 sales were made pursuant to tolling agreements, while tolling agreements represented more than 45% of Cargill's sales and 11.3% of Staley's sales. For HFCS 42, tolling agreements comprised 4.6% of ADM's sales, 9.6% of Cargill's sales, and 9.5% of Staley's sales.

[14] Plaintiffs respond with the assertion that negotiated transaction prices would likely have been even lower if the list prices, which were the starting point for negotiations, had been set in a competitive market. However, this assertion first assumes the existence of artificially-inflated prices as a result of a conspiracy that the Court finds has not been adequately proven in this case and is therefore non-probative. Even assuming the validity of the suggested correlation between list prices and transaction prices, all that is shown is another instance of parallelism.

> implemented the pricing systems, and its competitors could have decided independently to adopt it.

Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 53 (7th Cir.1992), *citing Market Force*, 906 F.2d at 1172; *United States v. Phelps Dodge Industries, Inc.*, 589 F.Supp. 1340, 1349 (S.D.N.Y.1984).

4. Circulation of Price Lists

Plaintiffs contend that the industry practice of publishing price lists in advance of their effective dates "insure[d] that each [producer] understood the prices the other manufacturers were using." Defendants respond that the announced price lists have no real relevance because the majority of purchasers did not pay list prices and that such prices could not be used to monitor pricing practices, as the abundant use of discounts, tolling agreements, and multi-year contracts renders list prices non-reflective of actual transaction prices. Defendants also note, without contradiction, that the publication of advance price lists and adoption of another competitor's announced pricing was common both before and after the period in which a conspiracy is alleged to have occurred.

The Supreme Court has consistently noted that "the dissemination of price information is not itself a per se violation of the Sherman Act." *United States v. Citizens and Southern National Bank*, 422 U.S. 86, 113, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975), *citing Maple Flooring Manufacturers' Association v. United States*, 268 U.S. 563, 45 S.Ct. 578, 69 L.Ed. 1093 (1925); *United States v. Container Corporation of America*, 393 U.S. 333, 338, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969). This circuit has further held that "the industry practice of maintaining price lists and

announcing price increases in advance does not necessarily lead to an inference of price fixing." *Reserve Supply*, 971 F.2d at 53, *citing Market Force*, 906 F.2d at 1172. Like the market at issue in *Reserve Supply*, there is evidence in this record that the advance publication of price lists served some purpose other than to facilitate price fixing, as the record demonstrates that buyers in the HFCS industry found the advance publication to be useful to their purchasing practices. Nicholas Guarino, Manager/Director of Sweeteners for Pepsi, testified in his deposition that he looked at the advance price lists to see where Pepsi's price was relative to the list price and to get a sense of market trends. (Guarino Dep. at 86.) James McDonough, the Director of Procurement for Ocean Spray, used the lists to get a picture of where the industry was at any given time. (McDonough Dep. at 73.) Likewise, Heinz' Manager of Ingredients and Raw Products waited on the issuance of the fourth quarter price lists and used them as a starting point for negotiation. (Johnson Dep. at 22.) Even Plaintiffs' expert acknowledged his familiarity with the issuance of advance price information in various commodity industries and that there can be advantages to purchasers where price lists are announced in advance, as they provide a "sense of what one participant in the market believes the realized price will be at some future point in time . . . [and] a point of bounds on the negotiations that will take place, or might take place between the buyer and a particular supplier or alternative suppliers." (Gordon Rausser Dep. at 291-92.)

Moreover, the record is simply devoid of evidence indicating that there was any defined plan for the exchange of price data among competitors or that any of the

Defendants received another Defendant's pricing information prior to the public announcement of the price list. *See Container Corporation*, 393 U.S. at 333, 89 S.Ct. 510 (finding concerted action where there was an express agreement to exchange pricing information that could be analogized to a well-supervised and elaborate plan for the exchange of pricing data among competitors.) To the contrary, there is evidence indicating that Defendants received copies of price lists or quotes of a competitor's pricing from their customers or other industry groups after they had been publicly announced. Peter Boynton, Cargill's Western Regional Sales Manager, stated that he received competitors' pricing information through sales reps and customers themselves. (Boynton Dep. at 35.) American Maize's Vice President of Marketing and Sales testified that he received price lists from brokers, customers, distributors, and trade publications. (Ash Dep. at 15.) Other representatives gave similar testimony. (R. Kirk Weidner Dep. at 72; Vincent Macciocchi Dep. at 126-27; Joe Tkach Dep. at 44-45.) Permitting an inference of antitrust activity from these facts "would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means. We can think of few inferences that would have a more undesirable distorting effect on market conduct." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 455 (9th Cir.1990).

It is undisputed that the HFCS market is a highly concentrated market dominated by very few players, and it is well established that where a market is dominated by a few major players, parallel pricing is not uncommon and is generally insufficient to prove an antitrust conspiracy.

> Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). *See also*, *Market Force*, 906 F.2d at 1172 (finding that evidence that brokers were aware of other brokers' policies before enacting their own policies is "nothing more than a restatement of conscious parallelism"); *In re Citric Acid Litigation*, 191 F.3d at 1102 (finding parallel pricing or follow-the-leader pricing strategies insufficient to promote the inference of a Section 1 violation.)

The identified documents, even when construed in the context of other proffered evidence, are insufficient to support a reasonable inference of conspiracy. At best, the evidence suggests nothing more than conscious parallelism/follow-the-leader pricing and does not tend to exclude the possibility that Defendants acted independently and legally in making their pricing decisions.

B. *Inter-Firm Communications and Opportunities to Conspire*

1. CRA Membership

Plaintiffs make much of the fact that various high-level representatives from the Defendant companies routinely attended the CRA meetings and place particular emphasis on the presence of Wilson and Andreas when

they were not members of the specific committee or board that was meeting. Because these types of meetings were used as a cover in the lysine and citric acid industries, Plaintiffs reason that the CRA meetings must necessarily have been used for the same purpose here. Plaintiffs also suggest that certain sales information was filtered through the CRA as a means of monitoring the conduct of the various conspirators.

However, the trade association in this case is very different from that at issue in either the lysine or citric acid cases in several critical respects. The CRA had been established in the industry for more than 75 years prior to the start of the alleged conspiracy period, as opposed to the lysine association, which was formed expressly for purposes of transferring sensitive information and monitoring market shares in the price fixing scheme. It has a professional staff, a Board of Directors, and several member committees and is open not only to HFCS producers, but also to firms engaged in the production of corn starch, corn syrup, alcohol, and other products made through the corn wet milling process. The CRA also engages in lobbying activities, the preparation of scientific and technical materials for the industry, and public relations, all of which are traditional trade association functions.

Defendants have introduced evidence indicating that employees of the various CRA members who were not CRA directors frequently attended these meetings before, during, and after the alleged conspiracy, which minimizes any purported significance resulting from Andreas' or Wilson's attendance. There were at least three and possibly four CRA members who are not named as coconspirators in this case who were presumably present at these same meetings, submitted the same types of monthly

production/shipment data for analysis, and received the same data in return. More importantly, the data submission process in this case was completely different from that in the other conspiracies. Unlike the citric acid and lysine conspiracies, where the co-conspirators secretly exchanged this data among themselves and received conspirator-specific data in return, the only evidence of record in this case is that CRA members submitted their individual data directly to independent accountants, received only aggregate information that was also submitted to governmental agencies for use in their statistical functions, and never saw another company's individual data.[15] (Ernest Micek Dep. at 187-88.) These facts strongly undermine any suggestion that the CRA and its reporting mechanisms were used for improper antitrust purposes.

Defendants have offered evidence from participants in the CRA activities indicating that price fixing was not discussed during these functions. Samuel Scott, CPC's Vice President and President of Corn Refining, testified that he was never invited by another HFCS supplier to attend any informal meeting outside of the formal CRA meetings and was unaware of any such meetings having been held. (Scott Dep. at 53-54.) The President and CEO of American Maize stated that he did not discuss his company's business, pricing, or production with any of American Maize's

[15] Plaintiffs argue that after receiving the aggregate data back from the accountants, each company could produce further calculations that would reveal its own market share. However, this would still not allow the companies to know their co-conspirators' individual information, and they would have no means of determining who was out of line and needed to either make a purchase or sell product to "balance the deal."

competitors at the CRA meetings and never confirmed any prices that his company was charging its customers. (McLaughlin Dep. at 31-32.) Norbert Cremers, Vice President for Sweeteners of ADM, denied ever having heard from any source that anyone from ADM had communications related to pricing or customer allocation with representatives from any competitors at CRA conventions or meetings. (Cremers Dep. at 73.) John Doxie of Staley was unaware of any discussion relating to pricing that came from a CRA meeting of any sort. (Doxie Dep. at 24.) Richard Jurgenson, President of MCP (which is not a defendant in this case), was also present at CRA meetings and denied having participated in any conversations that ran afoul of antitrust laws or having any awareness of any price fixing agreement; he also confirmed the presence of lawyers during CRA meetings to remind participants of the antitrust laws. (Jurgenson Dep. at 279-80.) Furthermore, although the winter and summer price lists were sometimes issued shortly after CRA meetings, the spring and fall price lists were issued months after (or prior to, depending on which way you look at it) the May/June and November/December meetings.

Essentially all that has been shown is Defendants' membership in a trade association and participation in its activities. Plaintiffs have offered no specific details with regard to any purported price fixing discussions but, rather, urge the Court to draw the inference of conspiratorial activity from the mere opportunity to engage in such conduct. Membership in a trade association and participation in its activities, without something more, does not tend to exclude the possibility of legitimate, legal activity, and it is the "something more" that the Court finds to be utterly lacking in this case. *See Moore v. Boating Industry*

Associations, 819 F.2d 693, 712 (7th Cir.1987) ("membership in a trade association, attendance at trade association meetings and participation in trade association activities are not, in and of themselves, condemned or even discouraged by the antitrust laws. . . . There must, instead, be some evidence of actual knowledge of, and participation in, an illegal scheme in order to establish a violation of the antitrust laws by a particular association member"); *In re Citric Acid*, 191 F.3d at 1103; *Maple Flooring*, 268 U.S. at 567, 45 S.Ct. 578 (transmittal of summarized statistical information which did not reveal the identity of any specific member to trade association members did not violate the Sherman Act.)

Nor does the DOJ evidence, admissible only against ADM, tip the balance. Plaintiffs cite to Wilson's attendance at lysine and citric acid meetings despite the fact that he had no direct responsibility for lysine and little knowledge of citric acid. They argue that the DOJ tapes reveal that he attended those meetings to teach and participate in price fixing and volume allocation based on his experience in HFCS. Contrary to the characterization suggested by Plaintiffs, the identified portions of the DOJ tapes all involve conversations about how to maintain a conspiracy in the lysine or citric acid markets and do not establish that Wilson gained his experience via a price fixing conspiracy in HFCS. The May 14, 1993, recording of Wilson, Whitacre, and members of the lysine conspiracy (Plaintiffs' Exhibit 4) contains a discussion of how individual data should be reported to one member of the conspiracy and circulated outside of the trade association. Wilson expressly draws a distinction between this method of secret data exchange and that done through the trade association "where it could be official." When asked by

another conspirator if the secret data exchange is how it is done in corn wet milling, Wilson replied, "No, we don't do that, we don't do that in corn wet milling," and goes on to say that corn wet milling is easier because he can guess what corn products are selling. At best, the recording identifies his experience in corn wet milling, which includes several products other than HFCS, such as corn syrup, corn starch, alcohol, and dextrose. Similarly, the November 23, 1993, December 1, 1993, and December 2-3, 1993, recordings consist of Whitacre (without Wilson being present) making vague references to foreign lysine or citric acid conspirators about Wilson's "experience" with the CRA, which also involves the other products associated with corn wet milling other than HFCS. The September 24 and 27, 1993, recordings indicate nothing more than Wilson's attendance at price fixing meetings in citric acid. The March 10, 1994, recording contains Wilson's often referenced statement that the buyer is not his friend, his competitors are his friends. While these recordings provide ample evidence of Wilson's involvement in price fixing in lysine and citric acid, they are far too vague to promote a reasonable inference that a conspiracy in HFCS served as the pattern for the other conspiracies.

2. Other Contacts

Plaintiffs identify certain other contacts among various Defendants which they suggest represent "high level, inter-firm communications" and opportunities to conspire. They point to communications between senior executives to arrange for inter-Defendant purchases of HFCS, meetings between ADM's Andreas and Ernest Micek ("Micek") of Cargill, calls from ADM's Wilson to

other senior executives to verify prices quoted to customers, other intermittent meetings between senior executives, and inter-relations between Defendant companies.

Defendants have acknowledged that there were occasional meetings between Andreas and Micek as a result of the fact that the two companies supply each other with products other than HFCS. Micek's testimony offers legitimate, unrebutted business justifications for the contacts, such as a tolling arrangement for sunflower and canola seeds in Europe, the purchase of an interest in a Bulgarian plant, the heart attack/bypass surgery of ADM's Jim Randall, and an offer to swap grain elevators. (Micek Dep. at 35-38, 42-43.) Micek also denied having ever discussed pricing or specific HFCS customers with Andreas, and, in fact, stipulated that there would be no discussion about HFCS pricing, customers, or any other product line as a condition of his agreeing to participate in conversations with Andreas. (Micek Dep. at 189, 191.)

For the proposition that ADM's Wilson called other senior executives to confirm pricing, Plaintiffs cite to the deposition testimony of Robert Heard, ADM's Vice President of Sales and Marketing during the time in question. However, the testimony relied upon is actually prefaced by the statement that Heard did not have any personal knowledge one way or the other as to whether Wilson ever checked to verify prices with any competitor. (Heard Dep. at 67.) At best, the testimony reveals his uncertainty – that he may have heard from Larry Bohr ("Bohr"), ADM's Sales Administrative Manager/Marketing Manager for Sweeteners, or Norbert Cremers, ADM's Vice President for Sweeteners, at some time between 1988 and June 30, 1995, that they suspected that Wilson had verified prices. (Heard Dep. at 67-68.) It was Heard's "impression" from

these conversations that Bohr "believed" that Wilson had obtained competitors' prices for HFCS. (Heard Dep. at 70.) Bohr testified that he had overheard Wilson asking his assistant to get Cargill's Boynton, Staley's Doxie, and American Maize's McLaughlin on the line but was not personally present for any of these calls and did not hear any portion of any conversation that may have resulted from any call; Bohr also denied that Wilson had ever informed him personally of the substance of any calls to competitors. (Bohr Dep. at 69-70, 119-21.) Cremers testified that Wilson had informed him of his intention to verify a price on 10 to 20 occasions over the years and that the individuals whom he would contact would be Boynton, Doxie, and McLaughlin. (Cremers Dep. at 38-39.) Heard also stated that on occasion, Wilson would say, "I'll call Boynton," "I'll call Doxie," or "I'll call McLaughlin" but was unable to provide any information about whether such calls were in fact made or, if they were, what was discussed. (Heard Dep. at 84-85.) Julia Krall, a secretary in ADM's Corn Processing Division who apparently kept Wilson's rolodex, confirmed nothing more than that she recalled Wilson receiving a telephone call from Staley's John Doxie on one or two occasions. (Krall Dep. at 48-49.)

With respect to Heard's recollection of an incident involving customer Hunt Wesson in which he believed Wilson had checked pricing with Cargill, Heard stated that Cargill (presumably Boynton) had not responded to Wilson's inquiry, which undermines rather than supports the inference of antitrust activity. (Heard Dep. at 74.) This is consistent with Boynton's testimony that he refused to discuss prices with Wilson and never provided any pricing information. (Boynton Dep. at 228-29.) Heard discussed another incident in which he believed that Wilson had

attempted to verify a price quote to Honickman Group from Staley; he did not know who Wilson had called but could only relate that Wilson said that, "they did make an offer . . . [that] was less than a specific number." (Heard Dep. at 72.) ADM then revised its quotation to a number less than its original quote but slightly higher than the alleged Staley quote. (Heard Dep. at 72.) Heard did not recall any specific attempts to verify a price with American Maize. However, McLaughlin stated in his deposition that on two or three occasions over the years, Wilson had made references to being "in at big blue" or "finished at big red" but that he refused to discuss this and, in fact, called Andreas to complain about Wilson's behavior. (McLaughlin Dep. at 69.)

These sporadic comments over the course of a seven-year time period do not reveal any reciprocal exchange of pricing information among competitors or discussion of future prices. In fact, the incident involving Cargill reveals an express refusal to discuss pricing. Even the assertion that someone at Staley verified a price quote that had already been given to the Honickman Group is nonprobative of collusion, as Heard testified that ADM's response was to drop its price to be competitive in order to retain the business. *See Blomkest*, 203 F.3d at 1034 (finding evidence of price verifications non-probative where they involved a past quotation rather than future market prices, there was no evidence indicating that the verifications had an impact on price increases, and the record suggested that prices were possibly cut as a result of the verification.)

Plaintiffs then point to a calendar entry indicating that Andreas was having dinner with McLaughlin in Chicago, one occasion when Larry Cunningham, Staley's

President from 1988-90, was introduced to Andreas by Staley's head of sweetener sales and marketing over lunch at the Decatur Country Club, and one of McLaughlin's expense reports indicating that he had dinner with Wilson and several other individuals during a CRA meeting in November 1993. There is nothing about any of this evidence that indicates that pricing or customer allocation was discussed on any of those occasions, and the evidence is far too ambiguous to support such an inference. Plaintiffs have again seized upon these few instances of so-called opportunities to conspire and insinuated that price fixing must have been discussed at these social encounters, without a shred of evidence to support that conclusion.

Finally, Plaintiffs note the "inter-relations between the companies and close relationships between senior executives of the various companies." (Plaintiffs' Corrected Consolidated Opposition at 95.) Andreas stated that his family had been personal friends with the family of Pierre Callebaut, a member of Staley's Board of Directors. Plaintiffs also point to the fact that ADM had a 7.5% ownership interest in Tate & Lyle, Staley's parent corporation, owned nearly 1/3 of American Maize's Class A stock, and held 26.8% of American Maize's outstanding shares. Plaintiffs also offer that senior executives had the phone numbers of their competitors' senior executives on their rolodexes or in their telephone books.

Again, Plaintiffs have, at best, shown opportunities to conspire, followed by the bald conclusion that the relationships were significant or allowed ADM to influence a competitor's operations without demonstrating a single example of such influence. There is simply no evidence indicating either that ADM used its stock holdings to

affect decisions concerning HFCS production or pricing or that Andreas and Callebaut discussed their respective company's pricing practices, even assuming that Callebaut was in a position to influence pricing decisions, as Plaintiffs have conceded that at Staley, "all pricing authority for HFCS was Doxsie's responsibility or the responsibility of the President of the company." (Class Plaintiffs' Proposed Findings of Fact and Conclusions of Law, ¶ 38.)[16] Nor can any reasonable inference be drawn from the fact that executives had other executives' phone numbers on their rolodexes, as there are several obvious and legitimate business reasons why they would have been in contact with each other; namely, to conduct CRA business or to arrange purchases/sales of product.

Thus, Plaintiffs have relied on inter-firm communications and opportunities to conspire which include trade association meetings and conventions, a minute number of meetings or social encounters between various executives over a lengthy period of time, the possibility of a relatively small number of price verification calls, and the bare fact that ADM owned a percentage of the stock of American Maize and Staley's parent organization. Similar, and arguably stronger, evidence was rejected in Blomkest, where the Eighth Circuit found "[t]he fundamental difficulty with the class's argument . . . is that it assumes a conspiracy first, and then sets out to 'prove' it. However a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly." 203 F.3d at

[16] It is undisputed that no Defendant held an ownership interest in Cargill or CPC.

1033. This observation is even more appropriate in the matter now before this Court.

"Where cooperation is necessary for a legitimate business purpose, the mere opportunity to conspire . . . is insufficient to support an inference of conspiracy." *In re Citric Acid*, 996 F.Supp. at 959, *citing Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 527 (9th Cir.1987); *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d at 784 (noting that "[c]ompetitors are permitted . . . to engage in cooperative behavior, under trade association auspices or otherwise, provided they don't reduce competition among themselves"); *In re Baby Food Antitrust Litigation*, 166 F.3d at 133, *citing Petruzzi's IGA v. Darling-Delaware*, 998 F.2d 1224, 1242 (3rd Cir.1993) (concluding that evidence of opportunity is entitled to little weight and that "evidence of social contacts and telephone calls among representatives of the defendants was insufficient to exclude the possibility that the defendants acted independently.") Even after considering the record as a whole, the Court finds that the evidence of sporadic inter-firm communications/opportunities to conspire does not tend to exclude the possibility of independent action, as required to support a reasonable inference of collusion.

C. *Exchange of Sensitive Information*

Plaintiffs also suggest that Defendants facilitated the conspiracy through the exchange of confidential information when Staley explored the acquisition of American Maize in 1989, CPC looked into a merger with American Maize in 1993 and 1995, and ADM purchased a 50% interest in Almex from Staley in 1993. They also note

Staley's disclosure of dextrin production information and its Decatur plant costs, ADM's disclosure to American Maize of its grind capacity, Cargill's discussion with ADM regarding a corn wet milling plant in Bulgaria, American Maize's consultation with ADM regarding the planned expansion of its plant in Hammond, Indiana, and the fact that ADM acquired a copy of a Cargill's form of tolling agreement through McKeany-Flavell, an independent broker acting on behalf of Ocean Spray.

The portion of the deposition cited in support of Staley's exploration of acquiring American Maize does not establish that any information was exchanged between the two companies, let alone confidential information. (Steve Hines Dep. at 142-43.) When CPC toured American Maize with an eye toward a possible merger, CPC's representatives were shown but not given copies of data indicating the number of salaried positions, the number of hourly positions, year-end production data, and a breakdown of year-end manufacturing costs under a confidentiality agreement that limited CPC's use of the information. (Plaintiffs' Exhibits 472-474.) The documents cited by Plaintiffs do not make any reference to pricing or customer information. Plaintiffs have not demonstrated that any of the individuals from CPC who participated in the merger discussions had responsibility for HFCS pricing or customer sales and have ignored the fact that this information was shown (and not given) to the CPC representatives under the scope of the confidentiality agreement. Instead, they ask the Court to engage in what amounts to sheer speculation that this information was used anticompetitively and that the provisions of the confidentiality agreement were breached. Likewise, the documents cited in

connection with the Almex joint venture are non-probative, as they have nothing to do with either pricing or customer allocation in the United States HFCS industry. To the extent that the word "price" even appears in the documents, Plaintiffs attempt to portray it as if it represents the United States HFCS industry, when it clearly referred to brainstorming sessions with respect to how the joint venture was to operate within the HFCS industry in Mexico.

The remainder of the alleged exchanges are equally non-probative for the same reasons. Staley and ADM exchanged some information with respect to the possibility of working together to reduce manufacturing costs for dextrin, a completely different product. Staley prepared proposed slides as part of "Project Storm" that would have disclosed its corn wet milling costs for the Decatur plant to ADM; however, the documents cited do not confirm that these slides were ever actually shown to ADM but, rather, suggest that the presentation was not made. (John Phillips Dep. at 138.) ADM may have told American Maize's Vice President of Operations its plant grind capacity but did not discuss future capacity or finishing capacity. (Randolph Holme Dep. at 48, 67.) Cargill's Micek and ADM's Andreas discussed the possibility of jointly operating a corn wet milling facility in Bulgaria, and ADM and American Maize toured each other's plants in connection with ADM's advising American Maize on the planned expansion of American Maize's Hammond, Indiana, plant, which did not manufacture HFCS. ADM acquired a copy of Cargill's form of tolling agreement with Ocean Spray from McKeany-Flavell, the broker who represented Ocean Spray in purchasing negotiations.

D. *Alleged Refusals to Supply or Lower Prices*

Plaintiffs also take issue with a handful of situations where a HFCS producer declined to cut its price in exchange for the opportunity to supply a greater volume of product to a customer. The first example is a situation that occurred in the second quarter of 1989, when ADM refused to sell to Pepsi after Pepsi attempted to negotiate a price reduction. The two companies had a letter of intent which Pepsi believed to be binding, while ADM considered there to have been no acceptance and sought further negotiation. (James Kozlowski Dep. at 71.) The dispute was ultimately resolved by a discussion between Pepsi's Chairman and ADM's Chairman, and ADM resumed its deliveries to Pepsi. (Kozlowski Dep. at 72.) There is no indication in this testimony or any of the other cited evidence indicating that a request was made of any other supplier to pick up the slack or that there was any refusal to supply by any other supplier during this period.

Plaintiffs next offer an incident in 1991 when Pepsi decided not to use ADM as a supplier for HFCS 55 and Staley refused to supply additional HFCS 55 to Pepsi despite the fact that it was operating at 80% capacity at that time. Nicholas Guarino, the Manager/Director of Sweeteners for Pepsi, stated that when the shortage hit, he spoke with unnamed HFCS 55 suppliers in an attempt to get more product; he does not state that he specifically spoke to Staley or that Staley refused to respond to his request. (Guarino Dep. at 29.) James Kozlowski, Pepsi's Vice President of Development and Procurement, then testified in his deposition that Pepsi lacked adequate sweetener supply "as a result of surging that it was doing in its business" and turned to third-party operators to fill

the gap. (Kozlowski Dep. at 72.) These third-party operators, who are identified only as "ADM-delivered distributors," were instructed by ADM not to sell to Pepsi. *Id.* While the precise identity of these third parties is not revealed in the record, it seems obvious that the other Defendants in this action are not "ADM-delivered distributors." Thus, the evidence identified by Plaintiffs simply does not stand for the proposition asserted.

Plaintiffs also reference Staley's refusal to supply Pepsi in 1992 after Pepsi asked Staley, as its largest supplier, to reduce the price of HFCS 55 for the same volume or reduce its volume for the same price. Staley gave Pepsi the ultimatum that it had to take all that Staley wanted to sell at the same price or nothing at all. (Guarino Dep. at 157-58.) When Pepsi declined this offer, Staley walked away from Pepsi's business for 1992, thinking that Pepsi would be unable to replace the lost volume with other producers and would have to come back to Staley. (Guarino Dep. at 159.) However, the record reveals that Pepsi was then able to replace the lost volume of HFCS 55 from Staley's competitors; namely, American Maize and Cargill, who then agreed to supply the HFCS at prices below those that had been offered by Staley. Contrary to Plaintiffs' suggestion, this is the essence of competition. When one supplier refused to drop its price, its competitors came in with lower offers and took the business.

Plaintiffs then turn to HFCS negotiations for 1994 and make the generalized statement that there "were almost no deviations from list price." Once again, the evidentiary support for this conclusion is woefully inadequate. The identified section of the deposition of Cindi

Chepokas, Cargill's Sales Department Marketing Assistant, does not confirm that there were no deviations from list price in 1994 negotiations; to the contrary, she stated that very few customers paid list price. (Chepokas Dep. at 134.) Peter Blaydes, a Cargill salesman who had just started in 1993, testified that he had sold HFCS to customers at list price but had also had occasion to deviate from that price during negotiations. (Blaydes Dep. at 39.) He then commented that in 1993, he had almost no deviations from list price but then clarified that he did not have to deviate because his customers were willing to pay Cargill's list price because Cargill had set the pricing floor for HFCS. (Blaydes Dep. at 40-41.)

Around that time, Plaintiffs assert that "no producer responded to a written request from Pepsi General Bottlers to provide more volume in return for lower prices." (Plaintiffs' Corrected Consolidated Opposition at 49.) However, this on its face is yet another example of producers in a concentrated market independently making a decision to preserve margins, and Plaintiffs have produced no other evidence which would tend to exclude this possibility.

The fact that Cargill did not quote HFCS pricing to Coca-Cola Bottlers Association that fall and declined business from Heilemann is likewise insufficient to support the inference of collusion, as is the assertion that no other producer tried to take away Cargill's business at Swiss Valley. Plaintiffs also note Coca-Cola's frustration in its attempts to shift volume during this time and the resultant perception of a coordination among the suppliers in their disinclination to budge very far from the list price. Defendants have responded that the contract negotiations for 1994 came in the wake of the flood in the midwest

during the summer of 1993 that decimated the corn crop and closed down one producer's plant in Iowa and, because of the risk involved with the reduced corn crop, they were unwilling to take on any additional risk. Again, Plaintiffs' evidence does not tend to exclude the possibility that HFCS suppliers were pursuing their independent interests by protecting as much of their margins as they could in the uncertain market.

In summary, Plaintiffs have focused on an infinitesimally small number of transactions in the universe of supply agreements that transpired during the alleged conspiracy period and attempted to cast them in the light of conspiratorial refusals to supply in order to maintain pricing or customer allocation agreements. Aside from the fact that many of the examples offered simply do not support the proposition asserted, Plaintiffs fail to rebut the established maxim in concentrated, oligopolistic markets that it can be in a supplier's independent interest to refuse to cut prices, thereby maximizing profits for all as "[t]he logical outcome of the price-cutting that [Plaintiff] advocates would be static market shares for the producers and reduced profit margins." *Reserve Supply*, 971 F.2d at 52-53. The fact that Defendants made a business decision not to drop their prices "does not suggest that they 'acted in a way that, but for a hypothesis of joint action, would not be in [their] own interest.'" *Id.* at 53, *citing Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir.1986.)

This conclusion is further supported by other evidence of record. An internal Cargill document reveals its strategies for pursuing ADM accounts with the desire to obtain the business without triggering a retaliatory price cut by ADM. (Defendants' Joint Appendix at 81.) The testimony

of ADM's Vice President for Sweeteners indicated that ADM had the same philosophy. (Cremers Dep. at 84.) In fact, ADM's Ted Keitzman stated that in trying to obtain business from an account that was historically supplied by Cargill, he would try to quote a price that would keep the customer from running back to Cargill with the quote. (Keitzman Dep. at 66.) Staley's Vice President of Sweetener Sales/National Accounts indicated that as a result of its higher cost structure, Staley was not interested in reducing prices to obtain new business. (Bosak Dep. at 68-69.)

E. *Inter-Defendant Sales*

A central theme in Plaintiffs' conspiracy theory is that, like the lysine conspiracy, any Defendant who had gained market share at another conspirator's expense had to "balance the deal" the following year by purchasing HFCS from the co-conspirator that suffered the loss. In support of this theory, Plaintiffs have identified Cargill's purchases from ADM and Staley in 1990, Cargill's 1991 purchases from ADM, ADM's purchases from Staley in 1992 and 1993, and Staley's 1995 purchases from ADM and Cargill. Although each of these transactions will be discussed in turn, the Court notes the glaring omission of any purchases by CPC or American Maize despite the fact that CPC gained market share in 1988 and from 1990-93 and lost market share in 1994-95, and American Maize gained market share in 1988 and from 1990-92 and lost market share in 1993-94.

In 1990, Cargill purchased HFCS from ADM and Staley, which represented 2.78% of Cargill's total sales for the year. Plaintiffs suggest that these purchases were to

compensate for the fact that Cargill's market share increased by approximately 1.5% that year, while ADM's and Staley's shares decreased by 1.7% and 2.1% respectively. However, this hypothesis ignores the fact that CPC and American Maize also lost their market shares that year, with CPC's market share decreasing by .5% and American Maize losing .2%. Plaintiffs have identified no purchases from either CPC or American Maize to compensate for their loss in market share.

Similarly, in 1991, Cargill again made purchases from ADM, which Plaintiffs contend was to "balance the deal." The record demonstrates that Cargill expanded its share of the industry that year by approximately 2.1%, while ADM's share decreased by .7%. Plaintiffs fail to identify or explain the conspicuous absence of purchases from Staley, which lost .3% of its share, or purchases by either CPC or American Maize, both of which increased their market shares by .6% during this period.

ADM made purchases from Staley in 1992, which were purportedly to compensate Staley for refusing to supply Pepsi. However, these purchases do not fit into Plaintiffs' prescribed pattern for how unauthorized shifts in market share are to be reconciled within the conspiracy. With the other purchases to "balance the deal", Plaintiffs look to the change in market share at the end of the previous year as an indicator of which producer gained market share and therefore needed to make purchases during the next year from those who had lost market share. That would mean looking to the market shares as of the end of 1991, when ADM *lost* 2.9%, CPC gained .1%, Cargill *gained* 1.8%, American Maize gained .8%, and Staley lost .2%. Thus, under Plaintiffs' theory, Cargill and American Maize should have been buying from ADM.

Plaintiffs also point to ADM's purchases from Staley in 1993. The record indicates that ADM increased its market share by 3% that year, while Staley lost roughly 4% of its market share. Nevertheless, they identify no purchases by CPC, which gained .6% that year or by Cargill, which gained .2%.

Likewise, Plaintiffs rely on purchases made by Staley from ADM and Cargill in 1995 as further evidence of "balancing the deal." During the relevant time period, Staley's market share increased by approximately 1%, and ADM's market share decreased by .2%. However, Cargill actually *increased* its market share by .1%, while CPC and American Maize's market shares *decreased* by .8% and .4% respectively. Accordingly, it would appear that there was no need for Staley to "balance the deal" with Cargill; rather, under Plaintiffs' theory, there should have been purchases from CPC and American Maize.

Significantly, Plaintiffs have identified no purchases to balance the deal in the following time periods, when their conspiracy theory would seem to have required such transactions: (1) as of the end of 1988, Staley had lost 1.3% of its market share while ADM's increased by .5%, CPC's increased by .5%, and American Maize's increased by .6%, which should have resulted in identifiable purchases by ADM, CPC, and American Maize in 1999, and (2) as of the end of 1993, Staley had gained 2.9% market share and ADM had gained .3%; as Cargill lost 1% market share and American Maize lost .5% market share, there should have been purchases by Staley and ADM from Cargill and American Maize in 1994 to "balance the deal."

Aside from the failure to identify the additional purchases that would have been necessary to complete the

suggested pattern, the record reveals that the inter-Defendant purchases of HFCS that have been identified were of a much smaller magnitude than would have been required to "balance the deal" for the amount of market share that was gained or lost in each instance. Cargill purchased only 843,208 cwt.[17] from ADM and Staley in 1990 when purchases totaling 1,851,440 cwt. would have been required to fully compensate for its gain in market share. Likewise, in 1991, Cargill purchased 258,810 cwt., when purchases of nearly 4.5 million cwt. would have been required to "balance the deal." It would have been necessary for Staley to have purchased 1,573,196 cwt. in 1995 in order to fully compensate for its gain in market share, but it purchased only 302,159 cwt. from other Defendants that year.

Once again, Plaintiffs have assumed the existence of a conspiracy and attempted to contort the evidence to support their presumption. However, as illustrated above, the evidence simply does not fit the mold in this case, and the glaring omissions in the pattern hypothesized by the Plaintiffs are telling. Although this alleged conspiracy supposedly functioned like the lysine and citric acid conspiracies, the Court has already concluded that Plaintiffs have failed to prove that HFCS producers had a comparable mechanism to facilitate the crucial sharing of individual sales and production data. Moreover, the citric acid scheme operated by allotting market shares to within 1/10 of 1%. Assuming that the HFCS producers agreed to

[17] Cwt. is the abbreviation for hundredweight, which is equivalent to 100 pounds.

this same or some similar margin, the data set forth above undermines rather than supports Plaintiffs' theory.

Plaintiffs attempt to salvage their argument by asserting that in the five identified instances, the purchases made were for prices in excess of the buyer's costs and the producer had excess production capacity. This assumes that at the time of each purchase, the buyer could have readily shifted its finishing capacity to produce the additional quantity of HFCS and that its capacity was not being utilized in some other respect, neither of which has been established in this case; to the contrary, Plaintiffs have conceded that the percentage of total finishing capacity used to make HFCS (capacity utilization) fluctuates throughout the year for several reasons, including seasonal variation in demand for products containing HFCS, routine plant maintenance, and storage of product in inventory. Furthermore, the handful of identified transactions out of the thousands of transactions that were consummated over the course of the conspiracy period represents cherry-picking of bumper crop proportions and does not evidence purchases of sufficient magnitude to come close to "balancing the deal" for gains in market share. Such a showing does not tend to exclude the possibility that Defendants acted independently or that the inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action.

F. *Cheating*

ADM and Cargill periodically paid rebates to customers in separate transactions that were not shown on their invoices. Plaintiffs contend that this is evidence of their secret attempts to cheat on the price fixing agreement.

However, ADM's Bohr testified that ADM issued rebate checks separately from the invoices at the customer's request and that the rebate was sometimes reflected in the contract request forms. (Bohr Dep. at 38, 40.) Although Plaintiffs cite to Bohr's testimony for the proposition that there were no entries on the computer for the rebates, his actual testimony was that he didn't know whether there were or weren't computer entries for this information. (Bohr Dep. at 40.) Such a showing does not tend to exclude the possibility that the Defendants were pursuing their independent interests.

G. *Discouragement of New Entrants*

The cost of setting up a corn wet milling plant and the fact that existing producers were expanding their capacities allegedly served as barriers to the entry of new participants in the HFCS market.[18] Plaintiffs then cite several attempts by HFCS suppliers to discourage new companies from joining the HFCS market or to enter into joint ventures with existing suppliers. Despite their effort to cast these attempts in an ominous light, there is nothing about this evidence that tends to exclude the possibility of independent action or the pursuit of legitimate, independent interests.

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[18] Cargill spent a substantial sum of money in order to construct and open a new corn wet milling plant in Blair, Nebraska, in 1995. It would seem nonsensical for Cargill to have undertaken such a great expenditure if it had agreed not [sic] exceed a specific market share that was not increasing as fast as the producers' expanding capacities.

H. *Opinions of Lower-Level Employees and Customers*

Plaintiffs then offer the statement of ADM's Vice President for Sweeteners that between five and ten times over the years, ADM would quote prices at Wilson's direction that its salesmen knew were too high to obtain the customer's business. (Cremers Dep. at 62, 81-82.) He also states that Wilson avoided aggressively going after the business of ADM's competitors in order to increase the profit on HFCS sales and prevent market prices from collapsing as a result of a retaliatory price war. (Cremers Dep. at 81-83.) ADM's Vice President of Sales and Marketing testified that ADM adopted a policy of maximizing its profit margins even at the risk of losing market share by refusing to price aggressively to pick up additional business. (Heard Dep. at 63-64.) Staley wanted to preserve price stability and avoid disrupting the market. Similarly, Cargill and American Maize refrained from pursuing other producers' accounts in order to be non-disruptive or trigger a volume market share war. Plaintiffs also note various statements of frustration by certain buyers in the HFCS industry at being unable to obtain lower prices for greater volumes of business or at not receiving competitive pricing from Defendants with more geographically convenient plants.

This is nothing more than Plaintiffs' oft-repeated argument that there must be something inherently anticompetitive about a producer's determination to preserve margins at the risk of selling less volume that the Court has rejected time and again in this Order. For the reasons set forth above, such a suggestion is equally unavailing in this context.

Although the conduct evidence is quite voluminous, quantity is not a substitute for quality. *See In re Potash Antitrust Litigation*, 954 F.Supp. at 1353 (noting that "[g]iven the sheer volume of this submission, as expanded by the Plaintiffs' recitation of pertinent depositional testimony, there is an instinctive, natural inclination to presume that such a daunting collection of documents must, *a fortiori*, generate triable issues of fact. Our review, however, has convincingly persuaded us otherwise.") In order for Plaintiffs to survive at this stage of the litigation, the Court must be able to reach the conclusion that the evidence of record and any inferences reasonably drawn therefrom would be sufficient to allow a reasonable jury to conclude that Defendants participated in an illegal price fixing conspiracy in the HFCS market. While some of the evidence identified by Plaintiffs could promote an inference that the nature of the HFCS market was conducive to conspiracy or that certain practices could be consistent with collusive activity, they have, at best, shown conduct as consistent with permissible competition as with illegal conspiracy. *See Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348; *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d at 787-88. The conduct evidence is therefore ambiguous as a matter of law and fails to support the substantial inferences that the Plaintiff class needs to draw in order to meet its burden. Rather, in order to reach the characterization favored by Plaintiffs, a jury would have to not only disbelieve Defendants' legitimate business explanations but also make additional assumptions that are simply not reasonable based on the record in this case. The Court is therefore comfortable in reaching the conclusion that when the conduct evidence is considered as a whole and all *reasonable* inferences are drawn in their favor, Plaintiffs have failed to meet their burden of

offering evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *See Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348.

However, as the Seventh Circuit has noted, where there is no direct evidence in support of an alleged conspiracy, a plaintiff can meet its burden to survive summary judgment by setting forth "*economic* evidence that would show that the hypothesis of collusive action was more plausible than that of individual action." *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d at 787 (emphasis added.) Therefore, the Court now turns to an examination of the economic evidence of record.

II. ECONOMIC EVIDENCE

A. *Rausser Report*

The primary economic evidence presented by the Plaintiff class is the expert report of Dr. Gordon Rausser ("Rausser"). After analyzing the market for sales of HFCS in the continental United States for the alleged conspiracy period, Dr. Rausser reached essentially five main conclusions:

> (i) the structure of the HFCS industry makes a conspiracy as alleged by the Class Plaintiffs economically plausible; (ii) the defendants engaged in several business practices that facilitated a conspiracy as alleged by the Class Plaintiffs; (iii) the defendants' behavior was inconsistent with their unilateral economic self-interest and indicative of a conspiracy as alleged by the Class Plaintiffs; (iv) HFCS prices were higher during the period of the alleged conspiracy than either before or after this period, even after controlling for changes in supply and demand factors

> between the conspiracy period and the non-conspiracy periods; and (v) the increase in HFCS prices was common to the Class Plaintiffs.

(Rausser Report at 2.)

1. *Structure of HFCS Industry*

Dr. Rausser considered the fact that HFCS is a commodity product, which means that the product as offered by different suppliers is perceived to be the same or homogeneous and purchasing decisions are generally based on price. (Rausser Report at 5-6.) Although other sweeteners are available in the marketplace, they do not provide viable functional or economic alternatives to HFCS, and consumers would not likely switch to these other sweeteners in response to a price increase. *Id.* at 4. Demand for HFCS is relatively inelastic; HFCS costs are a relatively small percentage of the overall cost of the goods in which it is used, so an increase in HFCS prices would not translate into a similar increase in the price of those goods, and demand is such that a price increase would not cause the quantity of HFCS sold to change significantly. *Id.* at 6-7. The HFCS industry is a highly concentrated oligopoly in which there is insufficient supply available from other producers to defeat a price increase. *Id.* at 7. The time and expense required to enter the HFCS industry even on a small level are somewhat prohibitive, particularly when existing producers maintain excess production capacity. *Id.* at 8-10. Finally, Dr. Rausser noted that the structure of the HFCS market appeared to be similar to the lysine and citric acid markets, in which ADM has pled guilty to antitrust violations. *Id.* at 13-14. From these observations, Dr. Rausser concluded that a HFCS conspiracy was economically plausible.

2. *Practices in the HFCS Industry*

Dr. Rausser then opined that certain industry practices would have facilitated the formation and maintenance of a conspiracy. For example, Defendants published price lists in advance of their effective date, which provided an opportunity to coordinate pricing. *Id.* at 14. HCFS was routinely priced on a zone-delivered basis, where all customers in a defined region were charged the same price regardless of their location within that region. *Id.* at 16. Dr. Rausser also made much of the suggestion that information from the CRA was used to monitor market shares.[19] *Id.* at 16-17. There is a degree of cross-ownership and joint development in the market, allowing one Defendant to influence the business decisions of another Defendant, and regular communication among high-level executives. *Id.* at 17-18. Finally, Dr. Rausser's regression analysis indicated that there was an average overcharge of 15.7% during the conspiracy period after controlling for other non-collusion variables. *Id.*

3. *Pursuit of Unilateral Self-Interest*

Defendants uniformly began setting list prices for HFCS 42 at 90% of the price for HFCS 55 when there had previously been no consistent relationship between the two prices. *Id.* at 19-20. Dr. Rausser found excess production capacity throughout the conspiracy period and purchases among Defendants at times when the purchaser

[19] However, as it is undisputed that Defendants received only aggregate data from the CRA, this particular suggestion is not probative of the point asserted and is entitled to little, if any, weight.

was allegedly not utilizing all of its own production capacity. *Id.* at 21-22. He then noted a handful of instances where Defendants refused to lower prices in order to obtain increased volumes from large customers. *Id.* at 23. On occasion, Defendants also allegedly confirmed prices being offered to particular customers. *Id.* at 25. These practices, according to Dr. Rausser, are inconsistent with HFCS producers acting in their unilateral self-interest because each producer should have made an effort to sell all of the product that they could regardless of the fact that they would have to drop their price and thereby reduce their profit margins in order to do so.

4. *Class-Wide Impact*

Dr. Rausser opined that HFCS transaction prices are correlated with list prices, as the negotiation of prices generally used the published list price as a benchmark. *Id.* at 26-27. He then found that the price of HFCS when procured under a tolling agreement had a statistically significant correlation with the price when procured under a fixed-price contract. *Id.* at 27. Based on his statistical analysis, Dr. Rausser also concluded that transaction prices during the conspiracy period were higher than either before or after the period, considering relevant supply and demand factors and that the prices and profit margins on average were higher than they otherwise should have been. *Id.* at 28. The implication, according to Dr. Rausser, is that any action affecting the price of HFCS to some customers would have the same impact on other customers and is consistent with the existence of a conspiracy to raise prices during the alleged conspiracy period. *Id.*

B. *Leitzinger Report*

The Plaintiff class also relies on the expert report of Dr. Jeffrey Leitzinger ("Leitzinger"). Dr. Leitzinger used the same factual assumptions and looked to many of the same factors identified by Dr. Rausser in reaching his ultimate conclusion that the prices for HFCS during the 1989-1995 period were inflated by collusive behavior. (Leitzinger Report at 2-5.) Specifically, he concluded that: (1) the HFCS market provided incentive for collusion; (2) the combination of high concentration, ready availability and comparability of price information, ongoing market share data, and cross-ownership gave Defendants the ability to detect cheating behavior; (3) the meetings among executives created ample opportunity to coordinate pricing decisions; (4) the pattern of conduct is difficult to explain as rational self-interest except by reference to collusive agreement; and (5) during the conspiracy period, the gap between prices and marginal costs increased. *Id.* at 5-6. He also found that the average net margin for American Maize, ADM, and Staley were higher during the conspiracy period than either before or after the period and that the increase could not be explained by decreases in the amount of market-wide excess capacity. *Id.* at 5.

C. *Other Economic Evidence*

In addition to the expert opinions of Drs. Rausser and Leitzinger, the Class Plaintiffs cite other evidence they believe tips the balance in their favor. They offer a Jacoby index calculation, which indicates that the relative market shares of the Defendants remained relatively "stable" from 1989 through 1995. (Class Plaintiffs' Corrected Consolidated Opposition at 60-61.) Additionally, pricing in the HFCS industry was based on a readily-calculable formula

starting from the Midwest zone-delivered price for HFCS 55, and this formula did not vary during the conspiracy period, which enabled suppliers to calculate their competitors' prices from the published list prices. *Id.* at 64-65. The negotiated processing fee in tolling agreements somewhat corresponds to the negotiated price in a non-tolling agreement and can be compared by customers. *Id.* at 65-66. Plaintiffs contend that this indicates an ability to fix prices even where tolling agreements were made pursuant to individual negotiations.[20]

In attempting to meet their burden, Plaintiffs have again relied largely on evidence of conscious parallelism and other conduct that is not probative of collusion as a matter or law, as well as comparisons to other acts of price fixing in different markets by former ADM employees. If there is in fact a demonstrable correlation between the negotiated processing fee in tolling agreements and the negotiated price in non-tolling sales, this is nothing more than another opportunity to conspire or circumstance that could possibly facilitate collusive behavior that lacks the additional support necessary to tip the scales and promote the inference of conspiratorial activity.

Plaintiffs point to the existence of a "readily calculable formula" for pricing HFCS 55 throughout the alleged conspiracy. However, "[t]he fact that a standard product is priced according to a standard formula does not indicate

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[20] In this section, Plaintiffs also surmise that the various attempts by larger Defendants to explore either acquisition or joint ventures with smaller Defendants provided opportunities for the exchange of confidential information, which was discussed above as purported conduct evidence. Id. at 71-72.

that a conspiracy exists; one manufacturer could have implemented the pricing system, and its competitors could have decided to independently adopt it"; the result would then be yet another example of conscious parallelism. *Reserve Supply*, 971 F.2d at 53.

The citation to the Jacoby index calculation, indicating that the relative market shares of the Defendants remained relatively "stable" from 1989 through 1995 and could be indicative of collusion is equally unavailing. While the Jacoby index considers coefficients of variation in a range of 7 to 15% to be normal, the raw indices for the various Defendants in this case ranged from 4.39% to 8.29%.[21] Furthermore, as discussed above in connection with the inter-Defendant purchases, there were in fact shifts in market share of up to 4% during the time of the alleged collusion. Under Plaintiffs' conspiracy theory, the HFCS market served as the pattern for the lysine and citric acid conspiracies, where volumes were strictly allocated and monitored to within .1%. As such, volume swings of up to 4% would appear to be inconsistent with Plaintiffs' theory of the case. In light of this evidence, as well as the fact that Staley had an essentially normal index value, the Jacoby index calculation does not tend to exclude the possibility of independent action, as required to support a reasonable inference of collusion.

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[21] Specifically, the Jacoby index was 4.39% for ADM, 5.13% for Cargill, 5.7% for CPC, 6.11% for American Maize, and 8.29% for Staley. After considering the much-touted inter-Defendant purchases, the values were still only 4.39% for ADM, 5.36% for Cargill, 5.68% for CPC, 6.10% for American Maize, and 6.84% for Staley.

The economic experts essentially base their conclusions of economic plausibility on their examination of this very weak circumstantial evidence and the assumption of inferences that the Court has found to be not reasonably supported by the record. The experts' reliance on evidence that is not probative of collusion as a matter of law in drawing a conclusion that the record is consistent with conspiracy or that a conspiracy would be economically plausible simply does not tip the balance in favor of the Plaintiff class or demonstrate that a hypothesis of collusion is more plausible than a hypothesis of individual action.

In *Blomkest*, the United States District Court for the District of Minnesota and the Eighth Circuit examined a strikingly-similar expert opinion by Dr. Rausser which was submitted in support of the plaintiffs' conspiracy theory in that case. In that case, Dr. Rausser looked at comparable (and arguably stronger) types of evidence and developed econometric models which purported to prove that the price of the commodity in that case would have been substantially lower in the absence of collusion. *Blomkest*, 203 F.3d at 1033. Specifically, he opined:

> [T]he structure of the industry is conducive to the formation of a price fixing conspiracy . . . certain of the Defendants' actions were inconsistent with individually rational, and economically maximizing, behavior . . . and [according to his statistical model] the prices that were existent, during the conspiracy, exceeded the prices that had been forecasted in the model, by an average of 35 percent.

In re Potash Antitrust Litigation, 954 F.Supp. at 1346.

In the district court, Judge Kyle concluded that Dr. Rausser's arguments were unavailing because they were in part premised on the theory that "the size of the price increase, in and of itself, supports the inference of a conspiracy" and "required a factfinder to infer irrationality from the decision of low-cost producers to sacrifice market share for higher product prices." *Id.* at 1357, 1363. After concluding that the proffered conduct evidence of price fixing was insufficient as a matter of law, the court went on to find that the plaintiffs' case did not gain additional substance from Dr. Rausser's expert opinion:

> [H]is opinions can be no more reliable than the factual underpinnings upon which they have been predicated. With modest exception, the mere passage of an untrustworthy evidentiary showing, through the mechanism of an expert's Report, will be wholly unavailing in curing the foundational deficiencies. In voicing his opinions, Dr. Rausser has necessarily accepted, as reasonable, the ambiguous showings that Matsushita regards as nonprobative. We may not do likewise.

Id. at 1389 (internal citations omitted.)

In affirming the district court, the Eighth Circuit found Dr. Rausser's opinion to be "not probative of collusion" because it failed to take certain facts into consideration and relied "almost exclusively on evidence (such as the producers' common membership in trade associations and their publication of price lists to customers) that is not probative of collusion as a matter of law." *Id.* at 1038. Under Federal Rule of Evidence 703, there must be "sufficient facts already in evidence or disclosed by the witness as a result of his or her investigation to take such expert opinion testimony out of the realm of guesswork and

speculation." *Id.*, *citing Hurst v. United States*, 882 F.2d 306, 311 (8th Cir.1989). The court then concluded that Dr. Rausser's "heavy (if not exclusive)" reliance on evidence that was not probative of conspiracy rendered his model "fundamentally unreliable". *Blomkest*, 203 F.3d at 1038.

The Court finds this analysis equally applicable to this case. Dr. Rausser examined similar types of conduct evidence, made the same types of unreasonable assumptions, performed what appears to be the same type of econometric analysis, and arrived at strikingly similar findings and conclusions. Dr. Leitzinger's opinion, which was based on Dr. Rausser's findings of fact, is similarly flawed and non-probative for the same reasons. Thus, Plaintiffs' experts add nothing of value to the deficient conduct evidence.

III. SUMMARY

As set forth in great detail above, no single piece of evidence tends to exclude the possibility of independent action. Even when viewing the totality of Plaintiffs' evidentiary showings, the evidence does not tend to exclude the possibility that the Defendants were pursuing their legitimate independent interests; "that composite view can claim no synergistic enhancement 'from a number of acts none of which' tend to exclude the real possibility of independent action." *In re Potash Antitrust Litigation*, 954 F.Supp. at 1389. In the words of a respected colleague in the United States District Court for the Northern District of Illinois, "it requires no sophistication in mathematical theory to recognize that zero plus zero still equals zero [;] . . . [i]f no incident has probative value, all incidents taken together have no probative value." *American Floral*

Services v. Florists' Transworld Delivery, 633 F.Supp. 201, 215 n. 23 (N.D.Ill.1986). As this is precisely the case with the record now before the Court, Plaintiffs' case is insufficient to allow a reasonable inference that Plaintiffs' hypothesis of collusive action is "more plausible than that of individual action." *See In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d at 787.

This is not a conclusion that the Court has reached lightly. To the contrary, the Court is fully cognizant of the enormity of what is at stake for both Plaintiffs and Defendants and has spent more than two months delving through the voluminous record submitted in connection with the present motions. Over the six years that this matter has been pending in this forum, the Court has afforded Plaintiffs every opportunity to fully develop their evidentiary presentation, including staying this matter for a considerable period of time based on their representations that the evidence contained in the DOJ materials was crucial to their case. Despite these opportunities and their exhaustive best efforts, Plaintiffs have simply failed to uncover sufficient facts to adequately support their allegations of a seven-year, multi-billion dollar antitrust conspiracy in the HFCS industry. As Plaintiffs have therefore failed to present a genuine issue of material fact requiring resolution by a jury, and no reasonable jury could find in their favor on the record presented in this case without resorting to pure speculation or conjecture, summary judgment is appropriately entered in favor of Defendants.

CONCLUSION

For the reasons set forth above, Cargill's Motion for Summary Judgment [# 630] is GRANTED; A.E. Staley's Motion for Summary Judgment [# 632] is GRANTED; American Maize's Motion for Summary Judgment [# 650] is GRANTED; and Archer Daniels Midland's Motion for Summary Judgment [# 652] is GRANTED. The Court will contact the parties in the near future to schedule a telephonic status hearing, during which the disposition of funds remaining in the CPC settlement fund and the briefing schedule for the *Gray & Co.* case will be discussed.

ENTERED this 23rd day of August, 2001.

Michael M. Mihm
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit

August 5, 2002

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

No. 01-3565

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION,	Appeal from the United States District Court for the Central District of Illinois.
APPEAL OF: CLASS PLAINTIFFS.	No. 95 C 1477 Michael M. Mihm, *Judge*

ORDER

On July 2, 2002, Archer Daniels Midland Co., A.E. Stanley Manufacturing Co. and Cargill, Inc. with appendix filed separate petitions for rehearing and petitions for rehearing *en banc* and on July 24, 2002 plaintiffs-appellants filed an answer. All the judges on the panel have voted to deny the petitions. None of the active judges

has requested a vote on the petition for rehearing *en banc*. The petitions are therefore **DENIED.**

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* Hon. Joel M. Flaum, Hon. Diane P. Wood and Hon. Ann Claire Williams did not participate in the consideration of the petitions.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit

August 8, 2002

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

No. 01-3565

IN RE: HIGH FRUCTOSE CORN SYRUP ANTITRUST LITIGATION,	Appeal from the United States District Court for the Central District of Illinois.
APPEAL OF: CLASS PLAINTIFFS.	No. 95 C 1477 Michael M. Mihm, *Judge*

ORDER

On page 20 of the slip opinion, issued on June 18, 2002, fifth line from the end of the page, the words "and citric acid" are hereby ordered deleted.

NOS. 02-692, 02-705, 02-736

IN THE

Supreme Court of the United States

ARCHER-DANIELS-MIDLAND COMPANY,
Petitioner,
v.
DELLWOOD FARMS, INC., ET AL.,
Respondents.

CARGILL, INCORPORATED,
Petitioner,
v.
A&W BOTTLING, INC., ET AL.,
Respondents.

A.E. STALEY MANUFACTURING COMPANY,
Petitioner,
v.
DELLWOOD FARMS, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Seventh Circuit (Posner, J.) correctly apply the standards enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in denying summary judgment for the defendants where the evidence in the record was more consistent with an unlawful horizontal agreement to fix prices than with permissible competition?

2. Where the courts of appeals, including the court below, have uniformly applied *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), to allow an adverse inference to be drawn where warranted against a party when related non-parties invoke the Fifth Amendment in civil actions, should this Court grant review to address the issue in this interlocutory appeal when its resolution played no part in the outcome below?

STATEMENT PURSUANT TO RULE 29.6

Respondent A & W Bottling, Inc. is privately held and has no parent corporation.

Respondent Carteret Packaging, Inc. is privately held and has no parent corporation.

Respondent Dellwood Farms, Inc. was merged into respondent Tuscan Dairy Farms, Inc.

Respondent E.B. Evans Food Company is privately held and has no parent corporation.

Respondent Golden Eagle, Inc. is privately held and has no parent corporation.

Respondent Grist Mill Company is wholly owned by Conagra Foods, Inc., a publicly held corporation, of which State Street Bank, as trustee, holds 36%.

Respondent Mohawk Distilled Products, Inc. is a limited partnership whose general partner is a privately held French company.

Respondent Pepsi-Cola Bottling Company of Olean is privately held and has no parent corporation.

Respondent Publix Supermarkets, Inc. is a publicly traded corporation, substantially all of whose common stock transactions have been among the company, its employees, former employees, their families and the benefits plans established for the company's employees. Huntington National Bank owns 11.97% of Publix. Huntington National Bank is wholly owned by Huntington Bancshares, Inc., of which no publicly traded company holds 10% or more of its shares.

Respondent Rite Foods, Inc. is privately held and has no parent corporation.

Respondent Seven Up Bottling Company of Jasper is privately held and has no parent corporation.

Respondent Sun-Dew Sales Corp. was merged into respondent Dellwood Farms, Inc., which in turn was merged into respondent Tuscan Dairy Farms, Inc.

Respondent Tom's Foods, Inc. is owned indirectly and ultimately by Heico Holdings, Inc., Allstate Insurance Company, TCW Shared Opportunity Fund L.P. and certain individuals.

Respondent Tuscan Dairy Farms, Inc., assigned its assets to Tuscan/Lehigh Dairies, L.P., the general partner of which is Tuscan/Lehigh Management, LLC, which is wholly owned by Dean Northeast, LLC, which is wholly owned by Suiza Dairy Group L.P., whose sole general partner is Suiza Dairy Group Holdings, Inc., which is wholly owned by Dean Foods Company, formerly known as Suiza Foods Corporation, which is a publicly traded company. Fidelity Management and Research Company is the beneficial holder, by virtue of Fidelity's acting as an investment advisor to various investment companies, of 13.052% of Dean Foods Company. Fidelity Management and Research Company is wholly owned by FMR Corp. FMR Corp. is privately held.

Respondent Vineland Syrup, Inc. is privately held and has no parent corporation.

Respondent Vita Food Products, Inc. is a publicly traded corporation with no publicly held company owning 10% or more of its stock.

Respondent Wells Dairy, Inc. is privately held and has no parent corporation.

Respondent Zarda Enterprises, formerly doing business as All Star Bottling, is privately held and has no parent corporation.

Respondents represent a class of United States purchasers of high fructose corn syrup ("HFCS") from July 21, 1991 through June 30, 1995, which includes manufacturers of soft drinks, canned goods, baked goods, confectionery products, dairy products and others.

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INTRODUCTION

This case involves a straightforward application of conventional summary judgment standards to a unique set of facts. A unanimous panel of the Seventh Circuit held that the summary judgment record demonstrated sufficient facts to justify a trial on the alleged horizontal price-fixing conspiracy. Crg App. 19a.[1] Without dissent, the Seventh Circuit rejected *en banc* reconsideration. *Id.* 95a. While petitioners obviously do not like the decision below, there is no conflict with this Court's decisions and no circuit conflict. There is also no circuit conflict on the tangential evidentiary issue raised by petitioner ADM concerning the invocation of the Fifth Amendment, an issue not relied on in reversing summary judgment. The fact-specific decision below is not "certworthy."

The Seventh Circuit applied the standard announced in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in examining the evidence in this case. In *Monsanto*, 465 U.S. at 764, and in *Matsushita*, 475 U.S. at 588, this Court stated the rule "that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

The court below examined the HFCS market structure, Crg. App. 6a-10a, and found it "auspicious for price fixing," *id.* 14a. It reviewed the economic "evidence of

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[1] The petition for a writ of certiorari of Archer-Daniels-Midland Company ("ADM") in No. 02-692 is identified as "ADM Pet.," of Cargill, Incorporated ("Cargill") in No. 02-705 as "Crg. Pet.," and of A.E. Staley Manufacturing Company ("Staley") in No. 02-736 as "St. Pet." Citations to the opinions and order of the court of appeals and the district court are to the appendix to Cargill's petition identified as "Crg. App."

noncompetitive behavior," *id.* 10a-14a, and found that "defendants avoided or at least limited price competition" *id.* 14a. Nonetheless, because "all of this evidence is consistent with the hypothesis that [defendants] had a merely tacit agreement," *id.* 14a, "that is, an agreement made without any actual communication among the parties to the agreement," *id.* 2a, these findings were *not* the court's basis for deciding summary judgment was unwarranted.

Matsushita further requires plaintiffs to "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently . . ., *in other words*, [to] show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action." 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764) (emphasis added).

Citing *Matsushita*, the Seventh Circuit applied this test. After describing the economic evidence outlined above, it examined *additional* evidence to determine

> whether there is *enough evidence for a reasonable jury to find that there was an explicit agreement*, not merely a tacit one. . . . Another and equivalent way to put this is that they [the plaintiffs] must present evidence that would enable a reasonable jury *to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so*. See, e.g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Crg. App. 15a (emphasis added).

After reviewing and summarizing some of, but not all, the additional evidence respondents presented in this case, the court of appeals found it "highly suggestive of the existence of an explicit though of course covert agreement to fix

prices." *Id.* 19a. "Highly suggestive" evidence of a conspiracy "*tends* to exclude" independent behavior and would permit a reasonable jury to infer such a conspiracy. The Seventh Circuit thus complied with the dictates of *Matsushita*.

Petitioners' position boils down to no more than the contention that the Seventh Circuit was required to quote the phrase "tends to exclude" in its opinion. Crg. Pet. I, 3, 8, 12-13, 15-20, 24, 26-28, 30; St. Pet. 2, 3, 11, 13, 15, 17-19, 21; ADM Pet. 28. However, a court is not required to use any particular verbal formulation in announcing its decision; the law is not made up of "magic words." Despite petitioners' contrary claims (Crg. Pet. 3; St. Pet. 3; ADM Pet. 25-26), the court below not only cited *Matsushita*, it applied the substantive law set out in *Matsushita* and *Monsanto*.

REASONS FOR DENYING THE PETITIONS

I. The Court Of Appeals Used The Proper Summary Judgment Standard.

A. The Court of Appeals' Opinion Represents a Routine Application of *Matsushita* and *Monsanto*.

Judge Posner's opinion for the Seventh Circuit is a routine and correct application of summary judgment standards. Under Rule 56(c), Fed. R. Civ. P., in determining whether "there is [a] genuine issue as to any material fact," courts are required to draw every reasonable inference from the evidence in favor of the non-moving party. See *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468 (1992) (citing, among others, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). This applies in antitrust cases. See, *e.g.*, *id.*, 504 U.S. at 468. As this Court has made clear, *Matsushita* is merely an articulation in the antitrust conspiracy context of the ordinary rule that "the nonmoving

party's inferences [must] be reasonable in order to reach the jury." *Id.*

In *Matsushita*, this Court explained that substantive "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," such that "conduct *as consistent with* permissible competition as with illegal conspiracy does not, *standing alone*, support an inference of antitrust conspiracy." 475 U.S. at 588 (emphasis added). In explaining how to apply this rule, the Court stated alternative formulations of the standard a plaintiff alleging an antitrust conspiracy must meet to survive a defendant's motion for summary judgment. First, it said:

> [A] plaintiff must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

Id. (quoting *Monsanto*, 465 U.S. at 764). The Court then immediately paraphrased this standard:

> *[I]n other words*, [a plaintiff] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff].

475 U.S. at 588. (emphasis added). In asserting that the court below failed to utilize the test articulated in *Matsushita*, petitioners repeatedly and misleadingly quote only the phrase "tends to exclude," and not the alternative formulation. In doing so, they fundamentally distort the relevant summary judgment standard established by this Court and ignore the analysis employed by the court below.

1. The court below correctly applied *Matsushita*.

a. The structure of the market

The court of appeals here applied the test articulated in *Matsushita*. It first examined the structure of the HFCS market to see whether the market was "one in which secret price fixing might actually have an effect on price and thus be worth attempting." Crg. App. 6a. After a detailed review of the market structure in light of economic principles, the court concluded that "the structure of the market was conducive to such [unlawful] behavior." *Id.* 10a.

b. Non-competitive behavior

The court then turned to "the evidence of noncompetitive behavior." *Id.* It found that, at the outset of the alleged conspiracy, ADM, followed quickly by the other defendants, raised the price of HFCS 42 to 90% of the price of HFCS 55. *Id.* It concluded that petitioners' explanations for this pricing change did "not counter an inference of price fixing." *Id.* 10a-11a. The court further found that, a few months later, the petitioners all changed their contracts from annual to quarterly, shifting risk to their customers, while raising prices. *Id.* 11a. It observed, "That is not competitive behavior." *Id.*

The court below also found that the defendants purchased HFCS from each other to sell to customers, even though each purchaser had excess capacity and could have manufactured the product at a lower price, and that this practice ended when the alleged conspiracy ended. *Id.* 11a-12a. "The possibility that springs immediately to mind is that this is a way of shoring up a sellers' cartel by protecting the market share of each seller." *Id.* 12a. And, despite growth in the market for HFCS, the court of appeals found that market shares remained stable – an indicium of an "agree[ment]

tacit[] or otherwise to share the sales opportunities created by the growth in demand."[2] *Id.* 13a.

In addition, the court of appeals found that plaintiffs' economic expert's regression analysis was "some . . . evidence that higher prices during the period of the alleged conspiracy cannot be fully explained by causes consistent with active competition." *Id.* 14a.

c. Requirement and evidence of explicit agreement

However, because the court below found all this evidence was consistent with a tacit agreement, it did not reverse the grant of summary judgment on this basis. Rather, it took the further step of examining the record to see if plaintiffs had adduced additional evidence sufficient to satisfy the test articulated in *Matsushita*. Given the misleading statements in the petitions, it is appropriate to quote the critical paragraph at length:

> To summarize the discussion to this point, there is evidence both that the HFCS market has a structure that is auspicious for price fixing and that during the period of the alleged conspiracy the defendants avoided or at least limited price competition. But as the defendants point out . . . all of this evidence is consistent with the hypothesis that they had a merely tacit agreement, which at least for purposes of this

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[2] Cargill argues that its market share increased significantly compared to the other HFCS producers. Crg. Pet. 7-8. The court of appeals rejected this argument: "[H]ad they [market shares] gyrated wildly, this would be some evidence of active competition. The defendants argue that they did gyrate wildly, but their evidence involves comparing pre-conspiracy (1988) market shares with market shares during the period of the alleged conspiracy (the district court followed them in this mistake)." Crg. App. 12a-13a.

> appeal the plaintiffs concede is not actionable under section 1 of the Sherman Act. *The question then becomes whether there is enough evidence for a reasonable jury to find that there was an explicit agreement, not merely a tacit one.* To repeat, there is evidence that the defendants were not competing; we might go so far as to say they had tacitly agreed not to compete, or at least to compete as little as possible; but the plaintiffs must prove that there was an actual, manifest agreement not to compete. *Another and equivalent way to put this is that they must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so.*[3] See, e.g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Crg. App. 14a-15a (emphasis and footnote added).

The court of appeals then examined *some* of the further evidence of an explicit agreement and determined that it was "highly suggestive of the existence of an explicit though of course covert agreement to fix prices."[4] *Id.* 19a. As described by the court, this evidence was:

- "[T]he alleged HFCS conspiracy began shortly after [Terrence] Wilson became head of ADM's corn products division – which raises the question why, if as the defendants argue the 90 percent rule and the other parallel behavior that is the plaintiffs' evidence of a lack of price competition in the HFCS market were just the natural expression of the

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[3] There is no material difference between the phrase "reject the hypothesis" and the phrase "tends to exclude," on which petitioners rely so heavily.

[4] The court stated that there was "some more evidence," but that the evidence it summarized was "enough" to defeat petitioners' motion for summary judgment. Crg. App. 18a-19a.

oligopolistic structure of the market, this behavior should have begun when Wilson, later to be imprisoned for price fixing [lysine], took charge of ADM's HFCS operations." *Id.* 18a.

- "One of Staley's HFCS plant managers was heard to say: 'We have an understanding within the industry not to undercut each other's prices.'" *Id.* 16a.

- "A director of Staley was reported to have said that '*every* business I'm in is an organization' (emphasis added [by the court]) – which sounds innocuous enough, but he said it in reference to the conspiracy to fix the price of lysine ('lysine is an organization') and so in context it appears that 'organization' meant price-fixing conspiracy." *Id.* 17a.

- "A Staley document states that Staley will 'support efforts to limit [HFCS] pricing to a quarterly basis.' Presumably the reference is to efforts by its competitors." *Id.* 16a-17a.

- "Michael Andreas, the vice chairman and executive vice president of ADM, said: 'What are you gonna tell [Keough, the recently retired president of Coca-Cola], that we gotta [i.e., have a] deal with . . . our two biggest competitors to fuck ya over[?]'" *Id.* 17a. Defendants conceded before the district court that Staley and Cargill were ADM's two biggest competitors.

- "The president of ADM stated that 'our competitors are our friends. Our customers are the enemy.'" *Id.*

- "[A] director of Staley's parent company . . . said in a memo to Staley executives that 'competitors[']' happiness is at least as important as customers[']' happiness.'" *Id.*

- "Andreas, a principal figure in the lysine and citric-acid price-fixing conspiracies, also referred to Cargill's president as a 'friendly competitor' and mentioned an 'understanding between the companies that . . . causes us not to . . . make irrational decisions.'" *Id.*

- "Andreas compared the relations between ADM and Cargill to those between Mitsubishi and Mitsui, two Japanese conglomerates widely believed to fix prices and allocate markets." *Id.*

- "A handwritten Cargill document refers . . . to 'entry of new entrants (barriers) and will they play by the rules (discipline).' . . . [C]onspirators will naturally worry whether, if there is entry, the new entrant will join rather than compete with the conspiracy and, if he refuses to join, whether the conspirators can punish him in some way." *Id.* 17a-18a.

- "Shortly after the FBI raided ADM's headquarters seeking evidence of the company's involvement in the lysine and citric-acid conspiracies, Terrence Wilson, the head of ADM's corn processing division – the division responsible for HFCS as well as for the other two products – said he didn't know 'what other companies [the FBI] hit. . . . I don't know . . . if they hit Staley or not.' Since Staley did not manufacture lysine or citric acid, but did of course manufacture HFCS, Wilson may have been expressing a concern that the FBI would uncover evidence of an HFCS price-fixing conspiracy as well." *Id.* 18a.

While this evidence may not be "conclusive," *id.* 19a, taken as a whole, it is not "as consistent with" independent action as it is with an unlawful agreement to fix prices, *Matsushita*, 475 U.S. at 588. Taken as a whole, the evidence before the court below amounts to far more than "snippets." See Crg. Pet. 1, 12-13, 20, 29; St. Pet. 12, 17. As the court

below found, the evidence it evaluated readily met the standard articulated by this Court in *Matsushita* and *Monsanto*.

Thus, petitioners are wrong to state that the court below "simply refuse[d] to apply the rules that were set out by this Court in *Matsushita* and *Monsanto*," Crg. Pet. 12, and "declined to apply," "pointedly declin[ed] to apply," "brushed aside as dicta," or "departed fundamentally from" *Matsushita* or *Monsanto*, *id.* 2, 3, 8; St. Pet. 2. The court did not announce any "new legal standard," *id.* 4, nor did it make any new law. There is no language in the opinion of the court of appeals, as claimed by petitioners, "underscoring that its decision was . . . [the] application of a different legal standard than *Matsushita*," "[r]easoning [that] *Matsushita* cannot apply, or holding that, in this case, *Matsushita* was "rendered . . . moot." *Id.* 10-12. Petitioners' arguments are merely misleading hyperbole.[5]

2. Petitioners attempt to confuse the issues.

Petitioners attempt to confuse the issues by urging that *Matsushita* and *Monsanto* prohibit plaintiffs from defeating summary judgment with "ambiguous" circumstantial evidence, regardless of how much or how strong the evidence is when viewed as a whole. St. Pet. i, 1-4, 12-14, 16-17, 20-21; Crg. Pet. I, 2-3, 12, 16-17, 23; ADM Pet. i, 6,

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[5] There is no validity to Cargill's fanciful argument that the court of appeals "reason[ed]" that *Matsushita* "appl[ies] only in cases where the plaintiffs' allegations are inherently implausible as a matter of economic theory." Crg. Pet. 18-20; see also St. Pet. 14-15. The court below did apply *Matsushita*. The language referenced in Crg. Pet. 8-9 and St. Pet. 14 asserts only the truism that "[m]ore evidence is required the less plausible the charge of collusive conduct." Crg. App. 15a; see *Matsushita*, 475 U.S. at 587.

25-28. This is not the law announced in *Matsushita* and *Monsanto*.

Because conspiracies are by nature clandestine, they often can be proven only through circumstantial evidence. By definition, as the court below discussed, circumstantial evidence is susceptible to alternative interpretations.[6] Crg. App. 16a. But, as *Monsanto*, 465 U.S. at 764, and *Matsushita*, 475 U.S. at 588, make clear, juries in antitrust cases are permitted to draw reasonable inferences from circumstantial evidence even when individual pieces of such evidence contain some ambiguity. Petitioners fail to recognize that there are degrees of ambiguity and that circumstantial evidence can be significantly probative even though different inferences possibly could be drawn from it.

Thus, in *Monsanto*, the Court stated that "the antitrust plaintiff should present direct *or circumstantial* evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 465 U.S. at 764 (citation omitted and emphasis added). Applying this test, this Court held that there was sufficient evidence of an antitrust conspiracy to go to the jury, relying in part on "ambiguous" statements in a distributor newsletter. *Id.* at 765-66. The Court recognized that the statements could be read either as an indication of an agreement or "a unilateral Monsanto pronouncement[ ]." *Id.* at 766 n.11. However, the Court

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[6] Petitioners suggest that the discussion in the decision below concerning the difference between "direct" and "circumstantial" evidence creates a division among the courts of appeals. Crg. Pet. 6, 26-28; St. Pet. 7. It does not. The Seventh Circuit did not suggest that the test in *Matsushita* should *not* be applied in a circumstantial evidence case, nor did it refuse to apply the test when other courts would have. Indeed, it concluded that respondents' case included circumstantial evidence, Crg. App. 16a, and applied *Matsushita*, *id.* 15a.

concluded, "The interpretation of these documents and the testimony surrounding them properly was left to the jury." *Id.* at 766.

Similarly, in *Matsushita*, after extensive discussion of the facts, this Court remanded to allow the court of appeals "to consider whether there is other evidence that is *sufficiently* unambiguous to permit a trier of fact to find" the alleged conspiracy. 475 U.S. at 597 (emphasis added). Thus, even though the Court had found the alleged conspiracy in that case to be economically implausible, it still did not require plaintiffs' evidence to be entirely unambiguous.

Matsushita therefore does not prohibit drawing from circumstantial evidence reasonable inferences favorable to the non-moving party on summary judgment in antitrust cases. 475 U.S. at 587. Indeed, it could not. See Rule 56(c), Fed. R. Civ. P. (containing no exception for antitrust cases).[7] "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Eastman Kodak*, 504 U.S. at 468.[8] *Matsushita*

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[7] As Justice Thomas wrote for the Court last term, a federal court is not free to bend the Federal Rules of Civil Procedure because of its views on the merits of a claim. See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514-15 (2002) (courts are not free to ignore Fed. R. Civ. P. 8(a) and impose a heightened pleading requirement in employment discrimination cases to weed out "unsubstantiated suits;" any different result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (internal quotation and citation omitted)).

[8] Petitioners express concern that application of the ordinary standard for summary judgment in price-fixing cases will deter legitimate conduct. Crg. Pet. 3, 13, 29; St. Pet. 5, 13, 21; ADM Pet. 28. *Matsushita* involved a claimed conspiracy to predatorily price, that is, to price *lower*, and the Court noted the concern that the law not discourage legitimate price competition. 475 U.S. at

simply holds that evidence, when taken as a whole, as consistent with lawful as unlawful activity will not support an inference of an actionable antitrust conspiracy. See 475 U.S. at 577.

Moreover, petitioners appear to insist that each item of evidence be examined individually in isolation, rather than in the context of the totality of the evidence. This position was rejected by this Court over 40 years ago.

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

Continental Ore Co. v. United Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)). This long-standing principle recognizes how people make decisions, considering not only the individual pieces of evidence, but also their interrelationship. For example, where four separate items of evidence when viewed together suggest conspiracy (albeit not conclusively), the case is obviously stronger than

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594. In contrast, the present case involves a claim of horizontal price-fixing for the purpose of inflating prices over their competitive levels. *Matsushita* recognized that in such cases there is "the desire that illegal conspiracies be identified and punished." *Id.* See also *Eastman Kodak*, 504 U.S. at 478 ("The alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.") In this respect, too, the Seventh Circuit's decision is consistent with *Matsushita*.

viewing each piece standing alone. Petitioners' arguments do not recognize this basic fact, which is one of the traps set by petitioners that the court of appeals explicitly recognized and took pains to avoid. Crg. App. 5a.

Petitioners also suggest that Judge Posner surreptitiously incorporated into the opinion below ideas from his antitrust text, *Antitrust Law* at 99-100 (2d ed. 2001), and permitted this case to go to a jury based on evidence sufficient only to support an inference of tacit collusion.[9] St. Pet. 3-4, ADM Pet. 27 n.14; Crg. Pet. 17. Whatever the merits of the views he expressed regarding tacit collusion in *Antitrust Law* at 93-100, Judge Posner applied well-established law here.[10] The opinion below expressly treated tacit collusion as "independent action." See Crg. App. 3a ("plaintiffs in this case concede that it must be an explicit, manifested agreement rather than a purely tacit meeting of the minds"); see also *id.* 14a. Judge Posner required respondents to show that "there is enough evidence for a reasonable jury to find that there was an explicit agreement, *not merely a tacit one*." *Id.* 15a (emphasis added). Obviously, this Court should not grant *certiorari* to correct what petitioners consider to be errors in Judge Posner's academic writing.[11]

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[9] This Court has repeatedly relied on Judge Posner's academic analysis of antitrust issues. See, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725-26 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48 n.13, 51 n.18, 53 n.21, 55, 56 & n.24 (1977).

[10] Contrary to petitioners' arguments, Crg. Pet. 17; St. Pet. 3-4; ADM Pet. 27 n.14, Judge Posner's major concern with the phrase "tends to exclude the possibility of independent action" is that "independent action" can refer to tacit collusion, not that as applied it prevents cases in equipoise from going to the jury. See *Antitrust Law* at 100.

[11] Moreover, when Judge Posner has disagreed with this Court's precedents, he has candidly stated his disagreement but always

There is no basis for believing that the Seventh Circuit did not apply the standard in *Matsushita* to the facts in this horizontal price-fixing case.[12]

B. The Court of Appeals' Decision Does Not Conflict With Any Other Circuit's Decision.

Not surprisingly, since the decision below involves just

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appropriately followed this Court's rulings. See *Kahn v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) ("despite all its infirmities, its increasingly wobbly, moth-eaten foundations . . ., *Albrecht* [*v. Herald Co.*, 390 U.S. 145 (1968)] has not been *expressly* overruled . . . [a]nd the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself"), rev'd 522 U.S. 3 (1997); see also *Scheiber v. Dolby Lab., Inc.*, 293 F.3d 1014, 1017, 1018 (7th Cir. 2002) (*Brulotte v. Thys Co.*, 379 U.S. 29 (1964), "has, it is true, been severely, and as it seems to us, with all due respect, justly, criticized . . . [H]owever, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"), pet. for cert. pending, No. 02-689.

[12] Contrary to petitioners' insinuations, Crg. Pet. 29-30, St. Pet. 21, ADM Pet. 29, the Seventh Circuit has aggressively weeded out cases when it concludes they could coerce extortionate settlements because of their sheer size, despite their apparent lack of merit. See, *e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (reversing class certification after considering the "intense pressure to settle" from "facing $25 billion in potential liability (conceivably more)"); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (Posner, J.) (one of the factors for exercising discretion to take an appeal under Rule 23(f), Fed. R. Civ. P., "is one in which the grant of class status places undue pressure on the defendant to settle regardless of the actual merit of the suit").

the factbound application of settled law, it does not conflict with the decision of any other circuit. The courts in the cases petitioners discuss at some length also applied the standard articulated by this Court in *Matsushita*. See *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1032 (8th Cir. 2000) ("*Potash*"); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 904 (9th Cir. 1987) (Kennedy, J.).[13] Far from reflecting any "fundamental difference[ ] in . . . approach," Crg. Pet. 23; see also ADM Pet. 27, the different outcomes between the decision below and those discussed by petitioners merely reflect differences in the facts. Summary judgment was denied below because of the specific evidence adduced here, which was neither "essentially identical," Crg. Pet. 21, "cookie-cutter" evidence, *id.* 2, nor evidence "present in almost every significant antitrust suit," *id.* 12 (emphasis omitted). Petitioners' other cases contained nothing approaching the quality or quantity of the evidence present here.

Citric Acid. The Ninth Circuit affirmed the district court's ruling that the evidence was insufficient to link Cargill to the

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[13] Each of the cases referenced without elaboration in St. Pet. 18-19 and ADM Pet. 25 did no more than apply *Matsushita* to the facts before it. See *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 569-70 (11th Cir. 1998); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1167-68 (6th Cir. 1995); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 513 (5th Cir. 1990); *Riverview Inv., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990); *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1013-14 (2d Cir. 1989).

conspiracy to raise citric acid prices. 191 F.3d at 1106. Cargill takes false comfort from that opinion and argues that, because it obtained summary judgment in that case, it should have won summary judgment here. Crg. Pet. 22. Unfortunately for Cargill, the two cases are very different.

In *Citric Acid*, there was an admitted conspiracy to fix prices. 191 F.3d at 1097. However, not only was there no direct evidence linking Cargill to that conspiracy, but the admitted conspirators effectively exonerated Cargill, a new participant in the citric acid market with a rapidly rising market share at the time of the conspiracy.[14] None of the conspirators "identified Cargill as a co-conspirator," *id.* at 1106, and one of the high-level executives involved in the conspiracy testified specifically that Cargill did not attend the price-fixing meetings, *id.* at 1097. See also 996 F. Supp. at 955.

Cargill seeks to equate the *Citric Acid* evidence with that here. Crg. Pet. 22. It points to a single internal document in the files of one of the citric acid competitors, H&R, which said that H&R should try to "gain share at accounts" without affecting the "ADM, Cargill, JBL shares," 191 F.3d at 1103. Crg. Pet. 22. The Ninth Circuit found this document to be as consistent with Cargill's legitimate behavior as with illegal behavior, because H&R had repeatedly lost business when it went head-to-head with Cargill due to Cargill's lower prices. *Id.* at 1104.

The evidence here is far different and far stronger. Cargill, one of the three largest HFCS producers, adopted the

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[14] Cargill's "market share rose from 0% in 1990 to about 20% by the mid-1990's," *In re Citric Acid Litig.*, 996 F. Supp. 951, 954 (N.D. Cal. 1998), aff'd, 191 F.3d 1090, 1094 (9th Cir. 1999), and "the only market share data actually in the record . . . indicates that Cargill's market share continued to increase even after 1993," 191 F. 3d at 1102 n.7.

90% rule and quarterly pricing just as other HFCS producers did, and its market share throughout the alleged conspiracy period was suspiciously steady.[15] Cargill made HFCS purchases from ADM and Staley when Cargill had excess capacity and could have manufactured the HFCS it bought at a lower price, which Judge Posner recognized as "a way of shoring up a sellers' cartel by protecting the market share of each seller." Crg. App. 12a. Andreas compared ADM's and Cargill's relations to those of Japanese conglomerates widely believed to fix prices and allocate markets, and he said that ADM had an "understanding" with Cargill not to "make irrational decisions," and, in particular, a "deal" with its two biggest competitors, including Cargill, to "fuck" Coke, one of the largest HFCS purchasers.

Richards. The plaintiff there was a small, local nonunion "destination" trucking company with whom several larger union "origin" trucking companies severed their joint-trucking relationships. 810 F.2d at 900-01. The plaintiff sued, claiming the refusals to deal were the product of a conspiracy among the origin truckers not to deal with local destination truckers who "back solicited" – or stole – their customers by offering to cut the larger origin truckers out of future orders. *Id.* at 901. The Ninth Circuit correctly found that each defendant trucker had an independent reason not to

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[15] Cargill's HFCS market share was so steady over the entire six-and-a-half-year effective period of the alleged conspiracy that its turnover index was less than the norm for competitive markets found by Neil H. Jacoby in *The Relative Stability of Market Shares: A Theory and Evidence from Several Industries*, 12 J. Indus. Econ. 82 (1964). See Declaration of Gordon C. Rausser, dated January 21, 1998, Table 2-1, in the record before the courts below. According to *petitioners'* economic expert, who relied on Professor Jacoby's analysis, "[a] low turnover index, by itself, would have yielded proper grounds for prosecution" for violation of the antitrust laws. Kenneth G. Elzinga, *New Developments on the Cartel Front*, 29 Antitrust Bulletin 3, 19 (Spring 1984).

deal with back-soliciting truckers – namely, it did not want its customers stolen. *Id.* at 903. Further, there was no evidence of "interdependence" among the larger truckers, and no evidence that any larger trucker had severed its ties with plaintiff in response to back solicitation of a different origin trucker's customers. *Id.* at 904. There also was no allegation that, in the absence of a conspiracy among origin truckers, bilateral agreements between origin and destination truckers not to back solicit were unlawful. *Id.*

Against this background, the Ninth Circuit found "as consistent with" lawful as unlawful action, *id.*, the single piece of evidence introduced by plaintiff to support its allegation of conspiracy: deposition testimony by one defendant's official stating that, for 30 or 40 years, there had been a "gentleman's agreement" that competitors would not engage in back solicitation and steal customers, *id.* at 903.

The case below is not analogous to *Richards*. The evidence of conspiracy detailed by Judge Posner is both qualitatively and quantitatively much stronger.

Potash. That case arose against the background of a determination by the United States Department of Commerce that Canadian producers were dumping potash in the United States at prices below fair market value. 203 F.3d at 1031. The anti-dumping determination led the Department of Commerce to negotiate a Suspension Agreement with each of the Canadian producers, thereby raising potash prices by setting a price floor. *Id.* at 1031-32.

Moreover, the government-negotiated pricing agreement coincided with a change in the operation of the leading potash producer from a government-operated Saskatchewan company seeking to maintain local employment to one seeking to maximize profits by raising prices and reducing output. *Id.* at 1031, 1034. (In contrast here, at the outset of

the alleged conspiracy, the largest HFCS producer, ADM, came under the control of a subsequently convicted price-fixer, Wilson.)

Nonetheless, Cargill asserts that the evidence it describes from *Potash* was "essentially identical" to the evidence here. Crg. Pet. 21. However, the evidence reviewed by the court in *Potash* was much weaker and in a far different context.

The Eighth Circuit looked first at "sporadic" inter-firm price verifications that occurred during the alleged conspiracy. *Id.* at 1034. However, these communications lacked any nexus to changes in price. *Id.* at 1035. They did not take place before price increases – so they were not designed to facilitate them. See *id.* at 1033-34.

The court also examined a document sent to agents of one group of potash producers describing several days in advance the new price list of a large competitor that would take effect January 11. *Id.* at 1035. But, as the Eighth Circuit described, "[T]he producers did not uniformly increase prices to match the memorandum on January 11, 1988, and furthermore, one producer, Kalium, did not match the memorandum price at all." *Id.* at 1036. Having found that the potash producers failed to act as conspirators would be expected to act, the Eighth Circuit unsurprisingly concluded that the evidence was as consistent with lawful activity as with an unlawful conspiracy. *Id.* at 1032, 1038.

Baby Food. That case, too, was far weaker than the one at bar. Of the three companies that accounted for over 98% of the baby food sold in the United States, Gerber was the market leader selling 70% of the volume nationwide, Heinz was a lower-priced brand with a strong presence only in the central midwest and southwest, and Beech-Nut was a higher-priced brand with a strong presence only in New England, New York and eastern Pennsylvania. 166 F.3d at 116-17.

Baby food, unlike HFCS, is not a standardized item. There were more than 500 baby food products, making coordination among competitors more difficult. *Id.* at 116. Thus, in *Baby Food*, "the defendants' prices were not parallel." *Id.* at 128. On that "basis alone," the district court found "plaintiffs' case fails," and the court of appeals "perceive[d] no error" in that conclusion. *Id.*

The Third Circuit also found that "there [wa]s positive and unequivocal evidence that the defendants engaged in unilateral, aggressive competition limited only by budgetary considerations, cash and market conditions." *Id.* at 138. Indeed, the court observed that, during nine of ten years of the alleged conspiracy, Beech-Nut, which was at the time owned by Nestle, *made no profit* under the allegedly fixed prices. *Id.* at 137. The court found, "It is inconceivable that with losses running at least 10% for every case sold, Nestle would have remained a party to a conspiracy to fix prices, preserve Gerber's market share year after year, and run up its own losses." *Id.*

In the face of these bedrock factual distinctions, Cargill points to an "exchange[] [of] future price information with various sales representatives" of competitors in *Baby Food*, *id.* at 119. Crg. Pet. 21. However, the Third Circuit found that there was no evidence that these "exchanges of shop talk among field sales representatives who lack[ed] pricing authority" "had an impact on pricing decisions." 166 F.3d at 125.

Petitioners also cite a single memorandum from Beech-Nut's files referring to a "truce." Crg. Pet 21; St. Pet. 20. The Third Circuit, though, concluded first that there was no evidence that the memorandum referred to Gerber, which would have been indispensable to any conspiratorial agreement. 166 F.3d at 126. That court then found that, even with respect to the two minor players in the alleged

conspiracy, Beech-Nut and Heinz, "the single use" of the term "truce" in a memorandum, "which relates ostensibly to business competition and not price-fixing," "in the face of continuing fierce competition" after the end of a brutal price war "is as consistent with independent behavior as it is with price-fixing." *Id.* at 127.

The facts in *Baby Food*, where even the most basic evidence of conspiracy was absent, are a far cry from those here.

* * *

A panel of experienced jurists on the court below carefully reviewed the record and concluded that "the overall evidence of conspiracy . . . was abundant although not conclusive," Crg. App. 4a, and "highly suggestive of the existence of an explicit though of course covert agreement to fix prices," *id.* 19a. Because this determination is nothing more than a routine application of *Matsushita* and *Monsanto* to a particular set of facts, and therefore consistent with other circuits' cases, review should be denied.

II. The Tangential Evidentiary Issue Concerning The Invocation Of The Fifth Amendment Does Not Warrant Review.

Although unnecessary to its decision reversing summary judgment, Crg. App. 19a, the Seventh Circuit addressed and reversed the district court's ruling that no inference could be drawn against ADM from the invocation of the Fifth Amendment by its former executives, Andreas and Wilson. In questions 1 and 2 in its petition, ADM seeks review in this Court based on a non-existent circuit split.

Andreas was vice chairman and executive vice president of ADM during the time of the alleged conspiracy. *Id.* 17a.

Wilson was the head of ADM's corn products division and in charge of ADM's HFCS operations. *Id.* 18a. "After Andreas and Wilson were convicted and sent to prison for fixing the price of lysine, the plaintiffs deposed them and asked them whether they had fixed prices of HFCS as well. They . . . refused to answer on the ground that their answers might incriminate them."[16] *Id.* 19a.

The district court held that the refusal to answer could not support an inference of the existence of a conspiracy "particularly in light of the absence of other evidence in the record confirming Plaintiffs' conspiracy theory." *Id.* 41a. It reasoned that, once a witness invoked the Fifth Amendment in answer to *all* questions, as Andreas and Wilson did, "it is 'impossible to draw a negative inference from his refusal to answer any given question, as it would be if his assertion of the privilege had been selective.'" *Id.* 40a-41a (quoting *Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc.*, 1996 U.S. Dist. LEXIS 13621, *50, 1996 WL 535083, at *17 (N.D. Ill. 1996)).

The court of appeals properly reversed. First, it concluded that there indeed was other evidence of an HFCS conspiracy sufficient to provide a foundation for an inference of conspiracy from the invocation of the Fifth Amendment. *Id.* 19a. Then, it rejected the district court's conclusion that an inference may be avoided when a witness (following the usual practice) refuses to answer *all* questions, rather than selectively invoking the privilege. It found that the district court's ruling wrongly "assume[d] that a person has carte blanche by virtue of the Fifth Amendment's self-incrimination clause to refuse to answer questions." *Id.* 19a-

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[16] ADM pled guilty to criminal antitrust charges of fixing prices in the lysine and citric acid industries and paid a $100,000,000 fine. Crg. App. 30a.

20a (citing *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980)). The court below concluded:

> Andreas and Wilson . . . faced no further jeopardy – unless truthful answers to questions about the HFCS conspiracy would have tended to show that ADM had conspired to fix the price of that product as well. That would justify and explain their taking the Fifth and it would also entitle a jury to treat their refusal to answer as evidence that there indeed was such a conspiracy.

Id. 20a.[17]

A. In a Civil Case, an Inference May Be Drawn From the Invocation of the Fifth Amendment.

In criminal cases, no inference may be drawn against a defendant from the invocation of the Fifth Amendment. See *Griffin v. California*, 380 U.S. 609, 615 (1965). In civil cases, properly drawn inferences from an invocation of the Fifth Amendment may be used as evidence. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). "[A]side from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Id.* at 319. See also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (citing *Baxter*) (courts may "draw adverse inferences

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[17] This conclusion is consistent with the language ADM quotes from *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (per curiam), in ADM Pet. 10-11. As the language quoted in the text makes clear, what the court below was saying was that "a responsive answer to the question[s] or an explanation of why [they could not] be answered [could have been] dangerous," 532 U.S. at 21 (internal quotation and citation omitted), only if ADM had conspired to fix HFCS prices.

from [a] refusal to answer questions . . . in a civil proceeding without offending the Fifth Amendment").[18]

B. There Is No Circuit Split On Drawing Inferences From a Non-Party's Invocation of the Fifth Amendment.

In this case, the court of appeals held that an inference could be drawn against a corporation from the invocation of the Fifth Amendment by two of its former highest-ranking executives in response to questions concerning their involvement in illegal price-fixing activities as part of their jobs for the corporation. There is no split of authority among the circuits concerning the standard for determining the admissibility of an invocation of the Fifth Amendment by such non-parties to allow an adverse inference against a party.

In *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983), the Second Circuit found that "[t]he fact that the invokers of the privilege are no longer employees of the defendant does not necessarily bar admittance of their refusals to testify as vicarious admissions of their former employer." It then held that the invocations were admissible under Rule 403, Fed. R. Evid., as the probative value of the evidence was not substantially outweighed by the danger of

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[18] ADM's argument that, because the invocation is not "sworn" and "cannot be cross-examined," it is not trustworthy, ADM Pet. 9, 19, was already rejected by this Court in *Baxter*, when it permitted such invocations to be used in evidence in civil cases.

ADM also argues that one might lawfully refuse to answer a question on Fifth Amendment grounds when it would "furnish a link – which itself could be wholly innocuous – in a chain of evidence that could lead to prosecution." ADM Pet. 20. ADM cannot explain how an assertion by Andreas or Wilson that they had *not* participated in a conspiracy to fix HFCS prices could amount to such a link.

unfair prejudice. *Id.* In *RAD Serv., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275-77 (3d Cir. 1986), the Third Circuit held that former employees' invocations may be introduced against their employer under Rule 403, where "questions put to them pertained solely to events occurring while they worked for RAD" and the record was "replete with circumstantial evidence of [their] involvement." In *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481-82 (8th Cir. 1987), the Eighth Circuit held that a former director's invocation was admissible under Rule 403 against a non-profit corporate entity, where the invocation "made it more probable [under Rule 401, Fed. R. Evid.] that [the former director] had committed the acts in question" "when considered in relation to other key evidence introduced at trial." Finally, in *FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969, 978 (5th Cir. 1995), the Fifth Circuit held that invocations by non-employee witnesses who had a relationship with an allegedly defalcating employee were admissible under Rule 403 against the latter's employer, and, because the evidence was relevant and corroborated by other evidence, could be the basis of an adverse inference. In each of these cases, as here, the courts applied the same standard, looking at the facts and circumstances to determine "whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." *LiButti v. United States*, 107 F.2d 110, 124 (2d Cir. 1997).[19]

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[19] Twenty-year-old *dissents* in *Brink's*, 717 F.2d at 715, and *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 245 (3d Cir. 1983), relied on in ADM Pet. 10, 14-15, 18 n.10, and 20 n.11, do not create a circuit split. In any event, their approach to the evidentiary significance of invocations of the Fifth Amendment was rejected by the Court in *Baxter* as Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Thomas, recently explained in his dissent in *Mitchell v. United States*, 526 U.S. 314, 331, 332 (1999) (a refusal to permit an adverse inference from a refusal to testify on Fifth

ADM relies on *Veranda Beach Club L.P. v. Western Sur. Co.*, 936 F.2d 1364 (1st Cir. 1991), in an unsuccessful attempt to create the appearance of a split. ADM Pet. 16. In that case, plaintiff FRG Ventures, Inc. propounded requests for admission to defendant EWM Co. Responding on behalf of EWM, Robert Mongillo refused to answer a number of requests in reliance on his privilege against self-incrimination. *Id.* at 1373-74. The First Circuit *held* that the district court had not abused its discretion in refusing to allow the introduction of the requests and responses, "because they were cumulative; the information sought through the requests had already been conclusively established in other ways." *Id.* at 1374.

Only as an alternative holding, the First Circuit said that "[i]n a civil case . . . an individual's invocation of a personal privilege against self-incrimination cannot, *without more*, be held against his corporate employer *in circumstances analogous to those at bar*." *Id.* (emphasis added). The court rejected the proposition that an invocation of the Fifth Amendment by an employee designated to answer requests for admissions could automatically be held against his employer. *Id.* It concluded that a corporation's designation of an employee to respond to requests for admission and that employee's invocation of his personal right not to speak – the only basis FRG presented for drawing an inference against EWM from Mongillo's invocation – is inadequate *without more* to create an inference of the corporation's wrongdoing. *Id.*

Far from standing for the proposition that "the Fifth Amendment invocation by an officer of a corporation that was a party to the case could not be held against the

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Amendment grounds "runs exactly counter to normal evidentiary inferences").

corporation," ADM Pet. 16, *Veranda Beach* holds only that the mere relationship between the party corporation and its employee is insufficient by itself to permit an adverse inference from the employee's invocation. This is entirely consistent with the other courts of appeals' holdings (including the Seventh Circuit's here) that an inference may be drawn where there is other evidence supporting the logic and evincing the relevance and trustworthiness of the inference. This is how *Veranda Beach* has been understood in the First Circuit:

> *Veranda Beach* establishes no per se rule which insulates a corporate employer from any adverse inference based on an employee's invocation of his Fifth Amendment privilege. Rather, the court demanded that such an inference be based on something more than the mere existence of an employment relationship.

Data General Corp. v. Grumman Sys. & Support Corp., 825 F. Supp. 340, 352 (D. Mass. 1993).

There is no circuit split, and there is no reason for this Court to grant *certiorari* on the question of whether the Seventh Circuit correctly permitted an inference against ADM from Andreas' and Wilson's invocations of the Fifth Amendment in response to questions about their actions as executives on behalf of ADM.[20]

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[20] ADM Pet. 16-22 urges this Court to grant *certiorari* to pronounce some novel rule to govern inferences from invocations, which rule it is unable to articulate, but which would presumably differ from the uniform rule adopted by six circuit courts of appeals, including the court below. This amorphous argument cannot justify granting *certiorari* here.

C. The Interlocutory Posture of the Decision on the Invocation of the Fifth Amendment Renders It Inappropriate for *Certiorari* Review.

In any event, this issue is presented in an interlocutory posture that makes it inappropriate for this Court's review. Petitioner ADM concedes that the evidentiary ruling on the invocation of the Fifth Amendment was not necessary to the Seventh Circuit's decision on summary judgment. ADM Pet. at 6. Consequently, the significance of these invocations remains to be seen. Review, if it would be warranted at all, would therefore be appropriate only after a final judgment is entered. See, *e.g., Am. Constr. Co. v. Jacksonville T., & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct in the conduct of the cause"). As Justice Scalia wrote in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."

CONCLUSION

ADM's, Cargill's and Staley's petitions for *certiorari* in Nos. 02-692, 02-705 and 02-736, respectively, should be denied.

Respectfully submitted,

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No. 02-692

IN THE

Supreme Court of the United States

ARCHER-DANIELS-MIDLAND COMPANY,
Petitioner,

v.

DELLWOOD FARMS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents' argument concerning ADM's first question presented depends upon a false premise—namely, that the Court of Appeals here applied the same standard of admissibility as other circuits that have addressed nonparty invocations. And respondents make no argument at all with respect to ADM's second question presented.

1. The Brief in Opposition Misstates the Case Law.

Citing decisions of the Second, Third, Fifth, and Eighth Circuits, respondents assert that "*[i]n each of these cases, as here, the courts applied the same standard*, looking at the facts and circumstances to determine 'whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.'" Br. Opp. 26 (quoting *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997) (emphasis added)). Later, respondents go even farther, positing the existence of a "*uniform rule adopted by six circuit courts of appeals, including the court below.*" Br. Opp. 28 n.20 (emphasis added).

Respondents' claim of uniformity is specious.

First, contrary to respondents' suggestion, Br. Opp. 26, the Court of Appeals here did *not* apply a trustworthiness standard. *The District Court* applied such a standard—and ruled the invocations inadmissible. A. 46a. In contrast, the Court of Appeals relied upon what it called the "general rule" that "an adverse inference may be drawn from such a refusal in a civil case." A. 21a. The only limitation upon that rule was a trial court's "general power under Fed. R. Evid. 403 to exclude relevant evidence if its probative value is clearly outweighed by (so far as relevant here) its capacity to confuse the jury." A. 21a.

Second, despite what respondents say, it is just not true that the Second, Third, Fifth, and Eighth Circuits have all "applied the same standard," one that asks whether an adverse

inference would be trustworthy. Br. Opp. 26. The Second Circuit applies a trustworthiness standard, *see LiButti*, 107 F.3d at 124, but the Fifth and Eighth Circuits follow a "case-by-case" approach. *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 978 (5th Cir. 1995); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987). The Third Circuit appears to follow such an approach as well. *See RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 277 (3d Cir. 1986).

Third, respondents misrepresent the holding in *Veranda Beach Club Ltd. Partnership v. Western Surety Co.*, 936 F.2d 1364 (1st Cir. 1991). According to respondents,

> The First Circuit *held* that the district court had not abused its discretion in refusing to allow the introduction of the requests and responses, "because they were cumulative; the information sought through the requests had already been conclusively established in other ways." *Id.* at 1374.

Br. Opp. 27. In fact, however, the First Circuit did not hold that the information had properly been deemed cumulative. The language respondents quote appears, not in the First Circuit's statement of its holding, but in its description of the district court's ruling. *Veranda*, 936 F.2d at 1374. This is apparent when one examines the full sentence whose beginning respondents have lopped off:

> The court ruled that the requests and responses could not be read because they were cumulative; the information sought through the requests had already been conclusively established in other ways.

Id.[1]

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[1] Respondents also incorrectly describe the witness at issue in *Veranda* as a mere "employee" of the defendant corporation. Br. Opp. 27, 28. He was in fact "an officer and part-owner" of the corporation. *Veranda*, 936 F.2d at 1373.

In short, respondents are mistaken in suggesting that the Court of Appeals here simply issued one more in a consistent line of decisions concerning nonparty invocations.

2. Justice Scalia's Dissent in *Mitchell v. United States* Does Not Address Nonparty Invocations.

Respondents resort to further obfuscation when they cite Justice Scalia's dissent in *Mitchell v. United States*, 526 U.S. 314 (1999), as having rejected the view of nonparty invocations urged by Judge Winter and Judge Stern.[2] Br. Opp. 26 n.19. In *Mitchell*, the majority and the dissenters disagreed over whether *the Constitution* prohibited consideration of *a criminal defendant's* silence at sentencing. *Compare* 526 U.S. at 330 ("the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination"), *with id.* at 335 (Scalia, J., dissenting) ("the text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence" (emphasis in original)). What ADM's first question presented concerns, and what Judge Winter and Judge Stern addressed, is whether, the Constitution aside, *the law of evidence* should recognize *nonparty* invocations of the Fifth Amendment as competent proof. Nowhere in his dissent in *Mitchell* did Justice Scalia take a position as to the proper evidentiary treatment of nonparty invocations.[3]

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[2] *See Brink's Inc. v. City of N.Y.*, 717 F.2d 700, 715 (2d Cir. 1983) (Winter, J., dissenting); *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 245 (3d Cir. 1983) (Stern, D.J., dissenting).

[3] Similarly, none of the cases cited at Br. Opp. 24 concerned invocations of the Fifth Amendment by a nonparty.

3. Respondents Do Not Address the Court of Appeals' Substitution of an Answer-Based Standard for a Question-Based Standard.

It is striking that respondents have nothing to say in defense of the Court of Appeals' holding (which is the subject of ADM's second question presented) that "[t]o be privileged by the Fifth Amendment to refuse to answer a question, *the answer* one would give if one did answer it" must have a tendency to incriminate the witness. A. 22a (emphasis added). They have nothing to say because there is nothing that can be said. The holding is at odds with numerous decisions of this Court (including *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (per curiam)) and numerous decisions of other courts of appeals.

There is only one place in the Brief in Opposition where respondents even touch on the Court of Appeals' rewriting of the standard for invoking the Fifth Amendment privilege. In a footnote, respondents say the Court of Appeals' decision is consistent with *Ohio v. Reiner*, 532 U.S. 17, because

> what the court below was saying was that "a responsive answer to the question[s] or an explanation of why [they could not] be answered [could have been] dangerous," 532 U.S. at 21 (internal quotation and citation omitted), only if ADM had conspired to fix HFCS prices."

Br. Opp. 24 n.17. Respondents' claim of consistency is entirely dependent upon a truncated—and therefore distorted—version of the standard stated in *Reiner*.

Reiner actually states that "'*[i]t need only be evident from the implications of the question, in the setting in which it is asked*, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" *Reiner*, 532 U.S. at 20-21 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (emphasis added)). When one examines this

sentence from the *Reiner* opinion in its entirety, rather than looking only at the fragment quoted by respondents, it is apparent that the Court of Appeals' decision, far from being "consistent" with the *Reiner* standard as claimed by respondents, Br. Opp. 24 n.17, directly conflicts with that standard.

In recognition of the Fifth Amendment's "basic function[]" of "protect[ing] *innocent* men . . . who otherwise might be ensnared by ambigious circumstances," *Reiner*, 532 U.S. at 21 (emphasis and omissions in original) (internal quotations omitted), *Reiner* focuses the inquiry on the question and the setting. In contrast, the Court of Appeals holds that the availability of the privilege depends on what the witness's answer would be. That holding necessarily assumes that the privilege may be invoked only by those who in fact have something to hide—an assumption that is fundamentally incompatible with *Reiner* and the other decisions of this Court cited in *Reiner*, 532 U.S. at 21.

4. An Important Issue Fundamental to the Further Conduct of the Case Is Appropriately Reviewed Prior to Final Judgment.

Respondents' final argument is that, because the ruling on the Fifth Amendment invocations was not critical to the Court of Appeals' reversal of the grant of summary judgment, the ruling may not be significant, and any review by this Court should await final judgment. Br. Opp. 29. To the contrary, the significance of the ruling to the further conduct of this litigation—in which respondents are seeking $4 billion in damages—is manifest. "The potential prejudice in revealing the invocation of the Fifth Amendment is high . . . ." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1465 (5th Cir. 1992). Respondents elicited more than 200 pages of Fifth Amendment invocations at one of the relevant depositions and more than 300 pages of such invocations at the other deposition. PX 26, 138-39. Respondents no doubt will seek

to put all those invocations before the jury at trial. Whether the invocations are competent evidence is hardly a "[t]angential" issue. Br. Opp. 22.

Nor is the interlocutory character of the case a reason to deny review. In appropriate cases presenting important issues, this Court reviews interlocutory rulings "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (internal quotation omitted); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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